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Legal aspects of trade and economic relations between the EEC and China.

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LEGAL ASPECTS OF TRADE AND
ECONOMIC RELATIONS BETWEEN
THE EEC AND CHINA

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ABSTRACT

This thesis first examines the overall development of the EEC-China trade and economic relations. It then analyses the changing Chinese economy, the non-market economy theory, its application and implication in EEC-China bilateral trade relations. It is suggested that China is no longer a traditional NME after ten years of reform; its economy is in a transitional stage changing from an NME towards a mixed economy.

The thesis then reviews the 1978 EEC-China trade agreement. It is found that this agreement provides a highly restrictive MFN treatment between the parties, because China is not a member of the GATT, and is classified as an NME. The thesis analyses the legal framework and problems under the 1978 agreement, and its nature and possible legal effect both in the Community legal system and in the Chinese legal system. It then goes on to look at the Community internal regulations which govern imports from China.

The thesis also reviews the 1985 economic cooperation agreement between the EEC and China. It analyses the background and development of the agreement; the areas for cooperation and the investment clause. The cooperation agreement, it is submitted, is more an expression of political goodwill rather than a comprehensive economic cooperation framework such as the home convention.

A particular area, namely, antidumping, is separately discussed. This is not only because China is one of the principal targets of the EEC antidumping proceedings, but also the EEC employs a special set of rules against imports from China, as well as other NME countries. Trade in textiles is also special interested. It consists of major European imports from China, and as such has a special legal regime. The analysis suggests that trade in textiles between the EEC and China has become more restrictive since 1979.

Finally, both the impacts of a single market in 1992 and China's efforts to rejoin the GATT are discussed. It is suggested that the EC should continue to be committed to free trade in theory and more importantly in practice, and to remove existing restrictions on imports from China; whereas China should continue its economic reform and gradually open up its own market to the EC.

CONTENTS

CHAPTER I	HISTORY AND INTRODUCTION	1
A.	EEC-China Relations before 1975	
B.	Establishment of Official Relations	
C.	EEC-China Trade and Economic Relations since 1975	
CHAPTER II	NON-MARKET ECONOMY THEORY AND EEC-CHINA TRADE	25
A.	The NME Theory and EEC-China Trade Regime	
B.	The Reforming Chinese Economy	
C.	Classification of China as a Non-Market Economy by the EEC	
D.	Conclusion	
CHAPTER III	LEGAL REGIME UNDER THE 1978 TRADE AGREEMENT	53
A.	The MFN Clause	
B.	Balance of Trade Clause	
C.	The Safeguard Clause	
D.	The Joint Committee	
E.	Other Issues	
CHAPTER IV	THE 1978 TRADE AGREEMENT: NATURE AND EFFECT	118
A.	Nature of the Agreement	
B.	Direct Effect of the Agreement in the EC	
C.	The Effect of the Agreement in China	
D.	Conclusion	
CHAPTER V	COMMUNITY RULES ON IMPORTS FROM CHINA	168
A.	Rules on Products which are Liberalised	
B.	Rules on Produces which are not Liberalised	
C.	The GSP Issues	
D.	Conclusion	
CHAPTER VI	THE 1985 AGREEMENT ON TRADE AND ECONOMIC COOPERATION	198
A.	Trade Framework	
B.	Areas of Economic Cooperation	
C.	Investment	
D.	Community's Competence on Cooperation Agreement	
E.	Effect and Conclusion	

CHAPTER VII	EEC ANTIDUMPING LAW RELATING TO IMPORTS FROM CHINA	226
A.	Community Rules on Antidumping	
B.	An Initial Analysis of Proceedings against Imports from China	
C.	Law and Practices of the European Community Antidumping Relating to Imports from China	
D.	Remedies against Community Antidumping Measures taken in respect of China	
E.	Alternatives?	
 CHAPTER VIII	 EEC-CHINA TRADE IN TEXTILES	 281
A.	Trade in Textiles: Introduction	
B.	The 1979 Textile Agreement	
C.	The 1984 Supplementary Protocol	
D.	Prospects and Conclusion for EEC-China Textiles Trade	
 CHAPTER IX	 CONCLUSION	 334

CHAPTER I

HISTORY AND INTRODUCTION

- A. EEC - China Relations before 1975
- B. Establishment of Official Relations in 1975
- C. EEC - China Trade and Economic Relation Since 1975

CHAPTER I

HISTORY AND INTRODUCTION

This thesis will examine legal aspects of Trade and Economic relations between the European Economic Community ("the European Community", "the Community" or "the EEC") and the People's Republic of China ("China" or "the PRC")¹. Unlike the trade between the Community and the United States, which accounts for a significant part of the world transactions, EEC - China trade currently accounts for less than 2 per cent of the Community's total volume of imports and exports². The economic exchanges between them are also at an early stage of development. However, research on this area is not unimportant. First of all, on the one hand, the EEC for a long time has been the largest trading group in the world, and on the other hand, China has begun to grow into a major world trading partner. Since the late 1970's, in an attempt to modernise and develop its economy, China has pursued an open policy, under which links with the EEC as well as other developed Western countries have been encouraged. Since then, China's trade and economic relations with other countries have increased rapidly. It has, for example, improved its international trade position in terms of the world's total volume of export from 32nd in 1978 to 17th in 1983 and 16th in 1988³.

Table 1: China's Trade 1950-1988 (US\$ billion)⁴

Table 2: Trade between China and the Community (1971-1988)
(1971-1985: ECU million, 1986-1988 US\$ billion)

	1971	1972	1973	1974	1975	1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986	1987	1988
Trade	740	787	1151	1529	1820	2033	1654	2419	3421	3613	4177	4378	5695	5535	7304	11.60	11.05	12.87
Volume																		

Sources: 1971-1985 Eurostat and MOFERT
1986 People's Daily (Overseas Edition) 22 November, 1987
1987 Beijing Review 25-31 July, 1988
1988 China Economic News (No. 8) 27 February, 1989

Thirdly, China is classified as a "State-trading country" on the one hand and is actually a developing country on the other, legal aspects of trade and economic relations of such a country with the EEC are particularly interesting to be discussed. For example, how are economic exchanges conducted between them? What is the legal machinery for the bilateral trade? What legal problems are they facing and how should they deal with them?

Finally, China is applying to resume its seat in the General Agreement on Tariffs and Trade (the "GATT"). Trade and economic relations between the EEC and China are bound to have an impact on China's rejoining the international trade club. On the other hand, the consequences of China rejoining the GATT will inevitably reshape and restructure the trade and economic relations between them. A preliminary analysis of this interaction could be helpful to consider the future legal structure of trade and economic relations between the EEC and China.

A. EEC - China Relations before 1975

1. Relations in Early Years

Although there were no diplomatic relations between the Community and the People's Republic of China until 1975⁷, China, however, has started trading with Western Europe since early 1950's during the US embargo. In 1953, China negotiated a 30 million pounds trade arrangement with a commercial delegation from the UK, which later formed a well known body - the 48 Group⁸. In the same year a barter arrangement with France had also been concluded⁹. In 1957, a trade and payment agreement was concluded between the governments of China and Denmark¹⁰. And in the early 1960's, China also purchased over ten whole plants from Member States of the Community¹¹. However, these trade relations were very much limited. For 15 years between 1958 and 1972, the trade volumes between them had not been substantially changed. (See Table 3 below)

Table 3: Trade between EC and China before 1972 (million ECU)

	1958	1960	1963	1966	1967	1968	1969	1970	1971	1972
Total	547	566	318	774	872	762	802	809	759	787

Sources: Eurostat and MOFERT

Several factors were responsible for that. First of all, there were very cold political relations between China and the Western Europe generally. When the Chinese Communists came to power in 1949, China joined the Soviet bloc in the post-war international community

consisting of two major contrasting groups, whereas most Western European countries were under the wings of the USA¹². Under such circumstances a large volume of trade and economic exchanges between China and Western Europe were hardly possible. When the Korean war broke out, the United States imposed an embargo on China. It made trade between China and Western Europe even more difficult.

Secondly, both sides were more concerned with domestic tasks. As far as Western Europe was concerned, it was a stupendous task to rebuild Western Europe after World War II, which would badly need help from the Americans. For China, decades of civil war and Japanese occupation had severely damaged the economy, all of its attention was paid to rebuilding the political structure and the recovery of the economy of that country. Admittedly, domestic preoccupations have rarely restrained nations from becoming actively involved in international affairs. In China's case, especially, international trade and international help was badly needed. But the fact was that China adopted the "leaning to one side" policy at that time¹³. Large volumes of trading and economic exchanges were only conducted with the Soviet Union and Eastern European countries.

Thirdly, the Soviet Union's influence on China on this issue throughout the 1950's should not be forgotten. Right at the beginning of the establishment of the European Economic Community, the Soviet Union publicly denounced it¹⁴, and this was promptly backed by other Eastern bloc countries¹⁵. Under this circumstance any attempt on China's part to establish further economic relations with the

Community would have been tantamount to public defiance of Moscow - something the Chinese wished to avoid at the time. China needed more economic assistance from the Soviet Union to rebuild the country which the Community could not give.

Fourthly, when China split with the Soviet Union at the end of the 1950's, there was a possibility for a change in the relationship between China and Western Europe, but this opportunity was not taken up by the two sides. Isolated in the world, China then introduced a "self-reliance" policy¹⁶; international trade and economic exchanges were restrained to a special low level¹⁷ (see Table 4 below).

Table 4: China's Trade 1956-1966 (US\$ billion)

	1956	1957	1958	1959	1960	1961	1962	1963	1964	1965	1966
Export	1.65	1.60	1.98	2.26	1.86	1.50	1.50	1.65	1.97	2.23	2.34
Import	1.56	1.51	1.89	2.12	1.95	1.45	1.12	1.27	1.55	2.02	2.25
Total	3.21	3.11	3.87	4.38	3.81	2.95	2.62	2.92	3.52	4.25	4.59

Source: Almanac of China's Foreign Economic Relations and Trade, 1984

Fifthly, in theory, the Chinese policy-makers and economists had always considered foreign trade as subsidiary to the domestic needs, and never regarded foreign trade as an integrated part of the national economy until the 1980's¹⁸. In reality, China's capacity to trade with the EEC countries was limited. For one thing, the foreign currency needed for such transactions was scarce; for another, China's capacity to pay for imports through exports was severely restricted by the lack of exportable items. For yet another, because of the

"self-reliance" policy, it was not feasible for China to use foreign credits on a large scale.

Finally, the Chinese ideological framework in general at that time also played a weighty role. Having pushed the country to the left and adopted a policy of self-reliance coupled with an isolationist stance towards others, in particular Western countries, in 1958, the Maoist leadership could hardly afford to adopt even a neutral attitude towards the Community. Clearly the further development of economic relations with Western Europe beyond those very low level relations already established would damage even the image of the leadership itself.

In summary, there were serious practical, political and ideological obstacles to the development of trade and economic relations between the Community and China in the early years.

2. Relations During the Early 1970's

The real chance of improving bilateral relations between the Community and China came only in the early 1970's, when changes happened on both sides. On the EEC side, it had become a major international economic centre from the 1970's, especially after Britain, Ireland and Denmark joined the Community in 1973. On the Chinese side, even more dramatic changes had happened. Domestically, the fever of the "Cultural Revolution" was over, the moderates, headed by Zhou En-Lai, then Chinese Premier, reasserted themselves, and wanted to rescue the economy from crisis¹⁹. This created an

opportunity for increasing trade with the Community. Internationally, China resumed its seat in the United Nations in October 1971²⁰, followed by the dramatic visit of President Nixon in February 1972, which started the long process of normalisation of Sino-American relations. The favourable international situation brought up the possibility of developing the trade and economic relations between China and the EEC.

First, a number of Member States of the European Community established diplomatic relations with China at that time²¹, notably Italy (November 1970), Belgium (October 1971), West Germany (October 1972) and Luxembourg (November 1972). This provided the basis for further development of trade and economic relations between China and the Community, and effectively removed the obstacles for establishing diplomatic relations between China and the Community. Also, both China and the Community took a new view towards each other. China had not only regarded the Community as a major economic centre in the world, but also an important political power, which might eventually achieve military independence from the US. On a number of occasions it was fairly clear that China had begun to support Western European integration, especially political integration in the early 1970s. These were supported by favourable references to European integration in the Chinese Press²². The Community also took China more seriously. The European Council had its first favourable discussion on China and the European Parliament advised the Commission to take all appropriate initiatives to strengthen relations with China²³.

Economic factors also played an important role. Although the Chinese initially regarded the Community as of political rather than economic importance, the Community, however, clearly regarded China as an economic partner rather than a political ally (against the other superpowers). Both sides were interested to improve trade relations between them. Trade between EEC and China in the early 1970's grew smoothly²⁴, increasing from 787 million ECU in 1972 to 2046 million ECU in 1976²⁵. The Community looked on the Chinese economy, at least in the 1970's, as offering major prospects of a vast market. If the Community did not act in time this market would inevitably be lost to the Japanese who were already active in China, and to the Americans who were actively involved in developing relations with China. The Chinese market was considered to be so important that reports were published by the Community institutions regarding the vast size of China, the richness of its raw materials, the impressive level of growth, and the potential capacity of the country effectively to absorb goods from other countries²⁶. The basic estimates made the Community, pressed by Western European business circles, strengthen its determination to improve direct relations with China.

B. Establishment of Official Relations

There had been some contacts at various levels between Commission departments and Chinese representatives unofficially even before 1975, but there was no special machinery for relations between the Community and China at that time²⁷. The visits to Peking in the early 1970's by the Foreign Ministers of EEC Member States provided the opportunities for the leaders in the EEC and China to discuss the

possibility of developing direct relations between the EEC and China²⁸, but there was no clear direction until the visit by high ranking Commission officials to Peking in 1975²⁹.

The Community's initiative of concluding a trade agreement with China in 1974 played an important role in the establishment of official relations between the EEC and China. During its debate on 7 May, 1974 concerning relations with State-trading countries, the Council had reiterated that from then on, any trade negotiations should be led by the Community³⁰. Since the trade agreements made by Member States of the Community with the countries in question would expire at the end of 1974, the Council decided in September 1974 that the Community should make the point that it was ready to negotiate new agreements with the various State-trading countries³¹. In November 1974 the Commission forwarded a memorandum to China (and other State-trading countries) accompanied by an outline agreement laying down broad provisions for the conclusion of a possible trade agreement between the Community and China³². No other State-trading country replied but only China responded positively³³. This brought about the possibility of establishing official relations between the EEC and China.

The visit to Peking by Sir Christopher Soames, then Vice-President of the Commission, on May 4, 1975, as mentioned above, should be discussed in more detail. China was very cautious to start relations with the Community, so the invitation given to the Vice-President was private at first. The Commission accepted the invitation, but informed the Chinese that it was not possible for

Soames to accept it in his private capacity, since he was the Community's Commissioner. The invitation, the Commission insisted, had to be official in order to permit him to go to China³⁴. After initial hesitation, China officially invited Soames through the Chinese Embassy in Brussels³⁵. It was during this visit that China expressed: (1) its decision to establish official relations with the EEC and to send an Ambassador later; and (2) its readiness to negotiate an appropriate trade agreement between the two parties to replace the bilateral agreements with the Member States that were due to expire at the end of 1974³⁶. Clearly Soame's visit was a milestone in EEC - China relations, it created the appropriate basis for the start of speedily expanding trade and economic as well as political relations.

The crucial issue between China and the Community was the issue of Taiwan. The firm and very consistent opposition that Peking had formulated since 1949 to any "two Chinas" solutions had led the Chinese leaders to become very vigilant towards nations or international organisations with which they had decided to develop relations. When the Community decided to improve its relations with China, it was the first issue that had to be dealt with. Because the Community had concluded a textile agreement with the "Republic of China" (Taiwan) as late as October 1970, which had expired on 1 October 1973, it is quite understandable that China was particularly cautious on the attitude of the Community towards Taiwan. During Soames' visit to China, the Taiwan question was therefore repeatedly raised. The EEC delegation initially gave an informal assurance that the Community considered the Beijing Government as the only government

of China, and that it had no relations with Taiwan³⁷. However, the Chinese side insisted that the Community must formally and publicly declare its support of China's position that Taiwan was an integral part of China, and Beijing the sole government entitled to represent the Chinese state³⁸. The EEC delegation was reluctant to make such a declaration on the ground that it had no legal mandate to make any declaration that involved territories³⁹. Soames further explained that matters such as the recognition of States did not come within the responsibility of the Community⁴⁰. A compromise was finally reached as Soames publicly stated that the EEC had no official relations with nor had it entered into any agreement with Taiwan, and that this was in conformity with the positions taken by all the Member States of the Community⁴¹.

It is interesting to observe that if the public announcement made by Sir Christopher Soames is regarded as recognition of government, the Community nevertheless keeps separate trade relations with Taiwan; and that is acceptable to China. The Community's recognition, therefore, is more a political declaration. Both China and the Community recognized the de facto different jurisdictions between mainland China and Taiwan. The Community maintains "unofficial" economic relations with Taiwan⁴².

C. EEC - China Trade and Economic Relations Since 1975

Trade and economic relations have been rapidly developing since the establishment of official relations⁴³. There have been two

periods of rapid trade expansion between the EEC and China since 1975⁴⁴. The first came in 1978 when China started to introduce the ambitious "four modernisations" programme⁴⁵, and when China and the Community concluded a trade agreement in 1978⁴⁶. The second time was in 1985 and 1986. China at that time increased its sales to the Common Market and imported a huge amount of products from the Community resulting in large deficits in 1985 and 1986⁴⁷.

When the "Cultural Revolution" came to an end, the Chinese people found themselves facing economic difficulties again, the economic development was far behind other countries and the national economy was near to collapse⁴⁸. In order to overcome these difficulties the four modernisations (ie, modernisation in science and technology; modernisation in industry; modernisation in agriculture and modernisation in defence) programme was adopted as a national policy. This policy inevitably results in opening up to the outside world and importing more equipment, technology, management skills, capital and others. This brought the opportunity for the Community to intensify economic relations with China. The Trade Agreement concluded between them in 1978 and the textile agreement in 1979⁴⁹, brought the possibility for the Community to expand its trade share in China. The bilateral trade increased by more than 46 per cent. in 1978 and more than 41 per cent. in 1979⁵⁰.

Since the beginning of the 1980's, however, there has been an overall deceleration of EEC-China trade relations. Though the absolute trade figures continue to increase, the growth rate in

bilateral trade has slowed down⁵¹. This general stagnation may be attributed to a wide range of temporary factors, for example, to China's policy of economic readjustment⁵², to the European recession, and/or to the confusion generated by China's decentralisation and recentralisation of foreign trade system in 1980 and 1983 respectively, as a result of which European businessmen do not know "whether they should go to the provinces or to the centre, and which organisation they should address in order to obtain the quickest and most effective results"⁵³.

Although bilateral trade did not increase as expected during that period, other economic exchanges and relations have steadily developed. In the period from 1979 to 1983, investments in China and loans from the Member States of the Community totalled US\$1,603 million (or 7.4 per cent. of the total amount of foreign capital utilised by China during that time), of which US\$718 million were direct investments, while US\$885 million were loans⁵⁴. Economic co-operation also took place between the Community and China, basically within the fields of agriculture, energy and light industry. Such co-operation had cost ECU 16 million to the end of 1983 under various budget headings of the Community⁵⁵. With the background of increasing economic co-operation between the Community and China, the 1978 Trade Agreement eventually proved to be an insufficient framework, and the new Trade and Economic Co-operation Agreement was therefore concluded in 1985⁵⁶.

The re-increasing of bilateral trade came only at a time when the Community had gradually recovered from the recession and especially when China had readjusted its economy and started to speed up the process of economic reform, and introduced the economic reform not only in the agricultural countryside but also in urban industry⁵⁷. Bilateral trade reached US\$7.3 billion in 1985, a 42.2 percent increase over 1984⁵⁸ and over US\$11.6 billion in 1986, increased 39.2 percent over 1985⁵⁹. To the end of 1988, EEC-China bilateral trade reached as high as US\$12.87 billion, seven times the bilateral trade volume in 1975 when they decided to establish official relations⁶⁰. Trade with the EEC now represents a substantial part of China's trade, the EEC becomes one of China's top trading partners, in front of the United States, but behind Hong Kong and Japan.

Moreover, the Community has also become the leading supplier of high technology and equipment to China⁶¹. According to Chinese statistics, in 1986, China's imports of high technology and equipment from the Community accounted for 51 per cent. of China's total imports of such high technology and equipment from the outside world⁶². In 1987 and 1988 the Community continued to be the biggest supplier of high technology and equipment to China⁶³. Apart from trade, economic co-operation has also speeded up after the conclusion of the 1985 Co-operation Agreement. The cooperations are conducted mainly in areas of agriculture, energy and science and technology, and personnel training. In agriculture alone, the Commission provided 6.2 million ECU each year from 1984 to 1987⁶⁴, and 8.60 million ECU in 1988⁶⁵. The establishment of an EEC-China biotechnology centre in Beijing was

agreed in early 1988, with the Community aid totalling 80 million ECU over five years⁶⁶. Private direct investment from European companies also increased steadily. To the end of 1987 investment in China by European companies reached US\$1.75 billion⁶⁷. A number of Chinese companies also invested in Europe⁶⁸. As a result of the intensification of trade and economic relations, the Community decided to establish its diplomatic representation in China⁶⁹. The Delegation of the Commission of the European Communities was therefore established in May 1988, to handle the rapid expansion of bilateral trade and economic activities between the member countries and China⁷⁰. There are signs also that the Community was looking towards increased official commitment⁷¹.

Despite intensifying trade and economic relations between the Community and China, the development of these exchanges is nevertheless unsatisfactory to both parties. On the one hand, Europe in the early days expected China to be a major outlet for their products which has proved to be an unrealistic dream. The Community's trade with China is just over one per cent. of its total external trade⁷². On the other hand, the Chinese have always complained about European protectionism which has restrained further the development of bilateral trade. Trade with the Community represented 12 per cent. of China's total imports and exports in 1985 and 15.8 per cent. in 1986; but this figure is far behind China's trade with Hong Kong and Japan⁷³. China has also run successive trade deficits on a large scale with the Community⁷⁴. This in return has substantially limited China's ability to buy more from Europe. Thus far, trade and economic

relations between China and the European Community are admittedly far below the potential. This is, of course, not merely because of the problems of the legal framework governing bilateral trade and economic exchanges. Many factors contribute to the unsatisfactory reality of bilateral trade; these factors will be dealt with in this thesis to a certain extent but the focus of this thesis is primarily on the legal framework and legal problems in EEC-China trade and economic relations, mainly trade relations. And the discussion covers basically the period to the end of 1988.

Footnotes (Chapter I)

- (1) In 1975, China established official relations with the European Economic Community and in 1983, the relations officially expanded to include also the European Coal and Steel Community (ECSC) and the European Atomic Energy Community (EAEC), re, the whole Communities. This thesis discusses the relations and legal problems between China and the EEC mainly. Sometimes, however, the relations between the ECSC or the EAEC and China will also be discussed.
- (2) Eurostat 1986, 1987.
- (3) Almanac of China's Foreign Economic Relations and Trade by Chinese Ministry of Foreign Economic Relations and Trade (MOFERT), Vol. 1 (1984). And GATT, International Trade 88-89. Volume I P85.

(4) CHINA'S TRADE 1950-1988 (US\$BILLION)

	<u>Export</u>	<u>Import</u>	<u>Balance</u>	<u>Total</u>
1950	0.55	0.58	-0.03	1.13
1951	0.76	1.19	-0.43	1.96
1952	0.82	1.12	-0.30	1.94
1953	1.02	1.35	-0.33	2.37
1954	1.15	1.29	-0.14	2.43
1955	1.41	1.73	-0.32	3.15
1956	1.65	1.56	+0.09	3.21
1957	1.60	1.51	+0.09	3.11
1958	1.98	1.89	+0.09	3.87
1959	2.26	2.12	+0.14	4.38
1960	1.86	1.95	-0.09	3.81
1961	1.50	1.45	+0.05	2.95
1962	1.50	1.12	+0.38	2.62
1963	1.65	1.27	+0.38	2.92
1964	1.97	1.55	+0.42	3.52
1965	2.23	2.02	+0.21	4.25
1966	2.34	2.25	+0.09	4.59
1967	2.14	2.02	+0.12	4.16
1968	2.10	1.95	+0.15	4.05
1969	2.21	1.83	+0.38	4.04
1970	2.26	2.33	-0.07	4.69
1971	2.64	2.20	+0.44	4.84
1972	3.44	2.86	+0.58	6.30
1973	5.82	5.16	+0.66	10.98
1974	6.95	7.62	-0.67	14.57
1975	7.26	7.49	-0.23	14.75
1976	6.86	6.58	+0.28	13.44
1977	7.59	7.21	+0.38	14.80
1978	9.75	10.89	-1.14	20.64

(cont'd...)	<u>Export</u>	<u>Import</u>	<u>Balance</u>	<u>Total</u>
1979	13.66	15.68	-2.02	29.34
1980	18.27	19.55	-1.28	37.82
1981	20.89	19.48	+1.41	40.37
1982	21.82	17.48	+4.34	39.30
1983	22.20	18.53	+3.67	40.73
1984	24.42	25.36	-0.94	49.78
1985	25.80	33.41	-7.61	59.21
1986	30.90	42.90	-12.00	73.80
1987	39.92	42.90	-2.98	83.78
1988				102.80

Sources: 1950-1985: Almanac of China's Foreign Economic Relations and Trade 1985

1986: Beijing Review Vol. 30, No. 9 (2 March 1987)

1987: People's Daily, 15 January, 1988

1988: People's Daily, 31 August, 1989

- (5) See Eurostate 1980-1987 and Supra 3, Vol. 1 (1984); Vol. 2 (1985) and Vol. 3 (1986); Also see Vol. 4, International Trade (1988) Beijing p61.
- (6) The European Community ranks as China's third largest investor, after the US and Japan, among developed nations. EC nations invested US\$1.46 billion in 167 projects in China from 1979-1987, compared with US investment of US\$4 billion in 427 projects and Japan's US\$1.9 billion investment in 417 projects.
- (7) See Bull.EC. 5-1975, point 1.2.03. Also see Vol. 8 Peking Review No. 2, May 16, 1975 pp5-6. The visit to Peking paid by Sir Christopher Soames, then Vice-President of the Commission, 4th May 1975, established official relations between the European Economic Community and China.
- (8) People's Daily, 8 July, 1953 and 8 July, 1988.
- (9) II Compilation of Treaties and Agreements of the People's Republic of China (1953). A similar arrangement was also concluded between China and West Germany in 1957.
- (10) Ibid. Vol. VI.
- (11) Chinese Economy Post Mao. A compendium of papers (submitted to the Joint Economic Committee of the United States) Vol. 1, Policy and Performance (Washington: Government Printing Office, 1978).
- (12) Vol. 5 Selected Works of Mao Tse-Tung p247. Beijing; also see Kuang-Sheng Liao, Antiforeignism and Modernisation in China 1860-1980 H.K. The Chinese University Press 1984, p119.
- (13) Ibid.

- (14) See Declaration of the Soviet Foreign Ministry of 16 March, 1957. Text in Europa-Archive. 11 December, 1957. p9924 FF.
- (15) "Déclaration Commune des représentants des partis communistes des 6 pays et de la CECA et du Marché Commun". Cahiers du Communisme 4. (1959), pp404-408. Harish Kapur, China and the EEC: the New Connections 1986 Martinus Nijhoff Publishers p5.
- (16) Supra. 12
- (17) The stagnation of China's international trade during this period has contributed to its isolation internationally, also to its internal economic difficulties and adjustment.
- (18) Gon Fen Chang, Some Aspects of Foreign Trade Strategies, in Essays on International Trade, Vol 2 pp42-48, also Wang Shao Xi, Functions of Export Trade, Ibid, pp56-66.
- (19) Gao Fang, Ten year's History of Culture Revolution 1986. Beijing, p480.
- (20) Vol. 13 Peking Review No. 45 (1971) p3. United Nations General Assembly Resolution 2758, 1976th plenary meeting, 25 October, 1971. General Assembly Official Records; 26th session, Supplement No 29 (A/8429) p2.
- (21) Establishment of Diplomatic Relations between China and the Member States of the Community:
- | | |
|-------------|-------------------|
| Denmark | May 11, 1950 |
| U.K. | June 17, 1954 |
| Netherlands | November 19, 1954 |
| France | January 27, 1964 |
| Italy | November 6, 1970 |
| Belgium | October 25, 1971 |
| Greece | June 5, 1972 |
| FRG | October 11, 1972 |
| Luxembourg | November 16, 1972 |
| Spain | March 9, 1973 |
| Portugal | February 8, 1979 |
| Ireland | June 22, 1979 |
- Source: China Official Annual Report p380, by New China News Photos Co. & Hong Kong Kingway International Publication Ltd.
- (22) Peking Review (1971) Nos. 1, 24, 27, 37.45; (1972) No 7; (1973) No. 29 etc.
- (23) European Communities, European Parliament Working Documents 1976-1978.

(24) Trade between EEC and China between 1972-1976 (million ECU):

	1972	1973	1974	1975	1976
Import:	418	849	722	669	860
Export:	369	607	807	1153	1186
Total:	787	1151	1529	1820	2046

Sources: Eurostat. and MOFERT.

(25) Ibid.

(26) Supra 23, p10.

(27) OJ No. C145/27 22.1.1974

(28) Harish Kapur, p28

(29) Vol. 18, Peking Review No. 2, May 11 (1975) p5. Visit by Sir Christopher Soames, then the Commission's Vice President, detailed discussions, see below.

(30) Bull. EC 11-1974. Point 1.3.01.

(31) Ibid. 5-1974. Point 2.2.30.

(32) Ibid. 11-1974. Point 1.3.01

(33) China accepted the invitation to negotiate a trade agreement but made it clear that China would not like to be placed in the same category as the Soviet Union and other Eastern European countries. In effect, China was making a point to separate herself from other socialist countries. This was not only a reflection in the Sino-Soviet dispute, but also an attempt on China's part to put herself in a favourable situation vis-a-vis the Community in the hope that it would probably help in obtaining more beneficial treatment than other socialist countries. Harish Kapur, p34.

(34) Ibid.

(35) Ibid.

(36) Supra 29.

(37) Harish Kapur, p36.

(38) Ibid.

(39) Supra 29 and Bull. EC 5-1975. Point 1.2.04. Also see the press conference on 7th May, 1975 in Peking.

(40) Ibid.

- (41) Ibid.
- (42) The Community's trade relations with Taiwan are unofficial as required by China. The Community uses an autonomous regime to govern trade relations with Taiwan.
- (43) Trade between EEC and China between 1977 and 1988; see Table 2 of this Chapter.
- (44) Ibid.
- (45) Supra 11.
- (46) Trade Agreement between China and the EEC. OJ. L134 1978.
- (47) See table 2 of this chapter.
- (48) Supra 19.
- (49) OJ. No. L389, 31 Dec. 1986. Detailed discussion see Chapter VIII
- (50) See table 2 of this chapter.
- (51) Ibid.
- (52) World Bank, China: Socialist Economic Development, Washington DC 1983. Also see S. Feuchwang and A Hussain ed, Transforming China's Economy in the Eighties, 1988.
- (53) The Commission of the EC: The Reform of China's Trade System (Brussels, 27 July, 1982.)
- (54) European Parliament Working Document A2-74/85.
3 July, 1985 p10.
- (55) Ibid. p11.
- (56) Trade and Economic Co-operation Agreement between China and the Community. OJ. No. L250 1985.
- (57) An interview with De Clerk before the second China-EEC business week in 1985. see People's Daily, 3 Nov. 1985.
- (58) See Table 2 of this chapter.
- (59) People's Daily Nov. 22, 1987.
- (60) China Economic News (No 8) 27 February, 1989 p18.
- (61) People's Daily, 31 March 1989 and Bull. EC 3-1988, point 2.2.40.
- (62) Ibid.
- (63) Ibid.

- (64) China-Britain Trade Review, May 1989 p5. Also, People's Daily, 21 May, 1988.
- (65) Ibid.
- (66) Bull. EC 3 - 1988, point 2.2.40.
- (67) Beijing Review, July 25-31, 1988.
- (68) People's Daily, 14 May, 1989.
- (69) Bull. EC 5-1988, point
- (70) Ibid.
- (71) Bull. EC 11-1987, point 2.2.32. See also EC involvement in China, China-Britain Trade Review, January 1989 p13. However, the relationship between the EC and China has been seriously damaged since the beginning of 1989, both in terms of political relations and economic relations. On 16 March, 1989 the European Parliament passed a resolution on Human Rights in Tibet which condemned China's abuse of human rights in Tibet and required the foreign ministers of Member States to mediate between the Chinese Government and the Dalai Lama. China responded heatedly. The officials of the Chinese Foreign Ministry protested to the Spanish Ambassador, the country presiding over the Council, and the head of the Delegation of the Commission (see People's Daily, 27 March, 1989). The Chinese Parliament equivalent - the National People's Congress, issued a 6-pointed strongly worded declaration, condemning the European Parliament for interfering in China's domestic affairs. (See People's Daily, 30 March, 1989). The souring of relations has reached a new level after the "Beijing Event" on 4 June, 1989. During the Madrid Summit, the European Community strongly condemned the Chinese Government's action and imposed limited sanctions against China. These sanctions include: (a) suspension of all inter-governmental contracts and ministerial visits to China; (b) a ban on all military trade and co-operation with China; (c) the shelving of loans by Member States and a request to international institutions to freeze their loans to China; and (d) limitation of scientific, cultural and technical contact. This sudden reverse development has seriously damaged the relationship between the Community and China. The former very warm relationship has descended from a peak to the lowest level ever since the official relationship was established. However, in the best interests of both sides, the bilateral trade and economic relationships should continue to develop rather than the reverse.
- (72) Supra 59.
- (73) In 1988, for example, trade between China and Hong Kong amounted to US\$29.6 billion and between China and Japan US\$19.99 billion. China Economic News (No. 8) 27 February, 1989 p18.

(74) People's Daily, 15 January, 1988.

(75) Table 2 of this chapter.

CHAPTER II
NON-MARKET ECONOMY THEORY
AND
EEC - CHINA TRADE

- A: The NME Theory and EEC-China Trade Regime
- B: The Reforming Chinese Economy
- C: EEC's Classification of China as a NME
- D: Conclusion

CHAPTER II

Non Marketing Economy Theory and EEC - CHINA TRADE

The European Community has always been in a dilemma as how to treat China in bilateral trade relations. In some cases China was treated as a developing country, in others it was treated as a non-market economy (NME) country or sometimes referred to as a State-trading country¹. In its trade agreement with China the Community has avoided clarifying this question, but the trade agreement was concluded not only on a non-preferential basis, but also on a presumption that China was a non-market economy². Consequently the trade and economic relations between the EEC and China have been characterised by increasing restrictions and confrontations³. The Chinese economy is no longer a traditional NME but it is not yet a free market or even a mixed economy. It is in a transitional stage. This chapter will briefly examine the changing Chinese economy, the norm of non-market economy and its application and implication in EEC-China bilateral trade relations.

A. The NME Theory and EEC-China Trade Regime

The term "non-market economy" (sometimes also used as

"State-trading country") is commonly used to describe countries where goods and resources are allocated by government planning agencies rather than by prices freely set in the market⁴. Thus, people, not market, balance supply and demand. In general, the socialist countries are regarded as having non-market economies, while the developed Western countries are viewed as having market economies⁵. China, as a socialist country, has therefore been categorised as a non-market economy by the European Community in bilateral trade relations⁶. The latter imposed extensive quantitative restrictions and other restrictions over imports from China on the basis that China is a non-market economy⁷.

However, categorisation of free market economy and non-market economy is over-simplified. It is neither an accurate description of the economic reality in the different countries concerned, nor a sufficient ground to enable the legal framework of bilateral trade involving parties in question to be built on such hypothesis.

To better understand the problem of confusion and misuse of the concept of the NME, a brief discussion of this concept is necessary and helpful. The black or white categorisation of a country as either free-market or non-market is based upon simplistic theoretical distinctions defined as follows:

In a market economy international trade is driven by the independent decisions of buyers and sellers acting out of economic self-interest. Prices set by the market are used for allocating

scarce resources. These scarce resources are in turn channelled into their most efficient uses by the market forces of supply and demand. Consequently, prices act as rationing and signalling mechanisms by which goods are traded consistently with buyer preferences⁸.

In a non-market economy, by contrast, international trade is regulated by State planning and control which set the prices and output of goods, with scant consideration given to factors such as cost and efficiency. Resources are not regulated by a market, but instead by central planning, the NME government does not interfere with the market process, but instead replaces it⁹.

In addition, the NME is said also to have other characteristics, such as:

prices do not reflect relative scarcity nor are they related to market forces¹⁰.

productive resources are allocated in accordance with the central plan, with incentives encouraging compliance with the plan.

Profit does not have the same meaning in an NME country as it does in a market economy, given that NME enterprises are not profit - maximising. Instead, through central planning and the incentive structure, NME enterprises carry out the central planner's directives¹¹.

NMEs are also characterised by their inconvertible currencies. The basic rationale for currency inconvertibility is that convertibility would disrupt central planning¹².

Finally, centrally planned economics conduct foreign trade through State trading organisations which have a trade monopoly over product groups. This bureaucratic shield hinders manufactures' ability to respond to demands from foreign purchasers for their products¹³.

It must be pointed out that the market economy picture described above may fit into classic types of capitalist society. Since J. Keynes, there has been no pure free market economy without interference from the government. Today the economic realities in various countries show that no country fits the definition of either free-market economy or non-market economy in its pure form. Rather, there are different degrees of government control over the economic structure of the countries, and different numbers and types of enterprises coming under the direct control and ownership of government¹⁴. On the other hand, there are different levels of market orientation in various countries, varying from a market economy country, to a country with mixed economy, and to socialist countries reforming their economics systems towards more market orientations.

The economic structure in most, if not all, countries (including those labelled as free-market economies) is shaped by government control in one form or another. These controls may be applied

directly in the form of State ownership and/or mandatory planning, the government assuming direct control over an enterprise or a sector and making all pertinent decisions about production and/or pricing¹⁵.

Controls may also be applied indirectly through guidance planning, the government controlling the economy by using taxation, interest rates, the money supply and credit controls to promote particular economic objectives. Within this framework, private or independent enterprises plan and operate based on their assessment of market forces and profit maximisation¹⁶. It is, therefore, not surprising to find that the governments of Western countries often exercise those extensive direct controls over certain sectors; in the EEC for example, the Commission exercises considerable control over the output and pricing decisions of steel companies¹⁷. In the United States, and indeed all major industrialised countries, the government is deeply involved in the decision of production and pricing in agricultural products¹⁸. In developing countries, these direct control have been exercised even more extensively. Most developing countries maintain a monopoly or substantial monopoly of their international trade; a large number of governments in developing countries are involved directly in the decisions of production and pricing of, among others, commodities which are vitally important to the countries concerned¹⁹.

It is fair to say that although these countries are labelled as free market economies, the governments of these countries exercise different degrees of direct or indirect control over the economies. There is no absolute pure market economy in this sense. The

difference only exists in different degrees and extent of market orientations, and degrees and extent of government controls.

As far as socialist countries are concerned, the European Community has labelled them as State-trading countries (or non-market economy) without any distinction. Such general conclusion does not accurately reflect the economic reality in these countries any more. Some countries such as Czechoslovakia, the GDR, Romania and Bulgaria have retained a more orthodox socialist economy. Although there are some market-economic activities and some market mechanics have been introduced in these countries, these activities are very limited, and no substantial changes in their economic systems have occurred²⁰. These countries may still be correctly labelled as non market economies. Others, however, have been undertaking fundamental reforms in their economic systems. The reform of the economic systems in these countries is reflected in the relocation of government controls over the economy, the introduction of a market-type mechanism into their economy and market force being allowed to play increasingly more and more important roles. The reforms involve areas of state planning, enterprise, management, foreign trade system etc²¹. These countries, particularly Yugoslavia, China and Hungary, are now in the middle way between a traditional non-market economy and a free market economy, towards the direction of mixed economy²².

To summarise, concepts of non-market economy and free market economy have been used to distinguish two different types of economic systems. In economic reality, however, a free market economy also

exercises, sometime or somewhere, direct governmental controls over the economy, whereas a non-market economy may, on the other hand, have certain degrees of market orientation. The over-simplified concept fails, in particular, to address the economic reality in countries like China, whose economy is in the middle way towards a mixed economy. Consequently, a legal system based on such concept has declined China's status as a developing country, and therefore deprived it the right it ought to enjoy. It is not an accurate concept to describe China as a non market economy, the legal system based upon this is unfair and discriminatory.

B. The Reforming Chinese Economy

The history of the Chinese economic system may be divided into two different stages since the establishment of the PRC in 1949. Before the economic reform, it was a typical non-market economy; but since 1979, the traditional system has been changed gradually towards a mixed economy²³. This part of the chapter will briefly examine the changing Chinese economy, analyse the nature of reform and the unresolved problems, with emphasis on China's foreign trade system.

Before the economic reform in the PRC, the traditional characterisation of China as a non-market economy may have been valid²⁴. The country's economy was rigidly and centrally controlled by the government. The Chinese Communist Party resolution recognised that the Chinese government exercised excessive and rigid control over the enterprises; no adequate importance was given to commodity

production, the law of value and the regulatory role of the market; and there was equalitarianism in distribution²⁵. In the traditional Chinese economy before 1979, the allocation of resources was decided by the State planning, not by market forces. The enterprises were conducting production according to the mandates from the government, not according to the indication from the market. All prices were artificially set by the government without reflecting the supply and demand in the market. In the foreign trade sector, the State had absolute monopoly (only 12 state-owned companies were empowered to engage in import-export business)²⁶. All these carry the characteristics of a non-market economy.

The economic reform has changed this rigid economic system, and this economic system is still in the process of reforming. The objective of the reform is to establish a new system of planned commodity economy of Chinese style according to the Chinese government²⁷. In the author's view, it is a mixed economy with a combination of planning and market force.

For the purpose of the present thesis discussion, economic reform in China has been undertaken in the following ways:

- (a) to reform the planning system by allowing certain sectors of the economy to operate according to market forces rather than by mandated planning;

- (b) to reform the price system, so that prices are influenced by the market rather than set by the State;
- (c) to reform the enterprise system of ownership and management method, by separating enterprises from the State so they ultimately function independently, without direct administrative control;
- (d) to reform the foreign trade and investment system by reforming the foreign trade planning system, breaking down the State monopoly in foreign trade, and by relaxing foreign exchange control; and
- (e) to establish Special Economic Zones where not only are foreign investors offered better terms regarding investment, but also offering experience of allowing market forces to play dominant roles in these areas²⁸.

1. State Planning and the Market Force

Before the reform, China's economy was dominated by mandatory planning. Such a system has been regarded as not adequate or sufficiently efficient to keep step with reality²⁹. The reform programme therefore has two general aims. First, to reduce the number of products dominated by mandatory planning, by placing greater reliance on guidance planning and/or on the operation of the market. Second, by allowing the mandatory planning still to apply to a limited

number of products essential to the national economy while at the same time taking consideration of market forces. The result of planning reform is not only a reduction of the scope of mandatory planning but also an increase of attention to economic information and forecasting and to the influence of market forces on all types of planning.

2. The Price Reform

Of all the reforms, price reform is perhaps the most difficult to implement. In keeping with an economy dominated by mandatory planning, prior to the reform, prices were set by the central government reflecting neither the value of commodities, nor the relation of supply and demand. China gradually introduced floating prices, allowing prices to be floated within the margin fixed by the State; and free prices decided by the free market³⁰. The price reform focused on reducing the scope of State-determined uniform price levels and on increasing the use of both floating prices and free market prices. However, dramatic price increases over a short period, without attendant cost of living adjustments might have an undesirable political backlash which might in some way have weakened the reform. The price reform has therefore slowed down³¹. At present, free prices and State-set prices are both playing important roles in the Chinese economy (the so called "two-track system"), but with State-set prices playing a more dominant role in most areas of China³² (except in the Special Economic Zones where market economy plays a dominant role, the free market prices therefore also play a dominant role)³³. It is submitted that the only hope for the Chinese economy is to move

further towards a more mixed economy. To this end, the price reform should be continued to the effect of less State-set prices and more free market prices.

3. Reform of Ownership and Management System

The complete dominance of the central government over the economy before the reform meant enterprises were essentially owned and operated directly by the State. There was no line separating administration from enterprise; only one form of socialist ownership, "ownership by the whole people", received continuing ideological support³⁴.

The economic reform has largely made business enterprise an independent economic and legal entity "responsible for its own profit and loss and capable of transforming and developing itself and acting as a legal person with certain rights and duties"³⁵.

The economic reform has also separated ownership of the enterprise from the power to operate the enterprise, fortifying its independence from the government³⁶. In practice, this has been implemented through reforms in the management system. In State-owned enterprises the director (manager) responsibility system has been introduced instead of previous system of Communist Party Secretary being responsible for running the enterprise³⁷. The director is given broad powers to manage and is expected to take full responsibility for the success or failure of the enterprise³⁸. Although the State still

retains legal title, the enterprise is entrusted with full rights to possess, utilise and to a certain degree dispose of assets. The enterprise has broad decision-making powers over all aspects of its business, including planning, production, pricing, marketing, labour relations, financial management, and internal structuring³⁹.

The reform also promotes changes in the ownership structure by encouraging the expansion of various kinds of economic entities consisting of different form of ownership⁴⁰. While the State-owned enterprises remain the mainstay of the national economy, private and mixed forms of ownership have expanded⁴¹. Also, foreign investment has been encouraged, with the result of establishing over 19,000 foreign investment enterprises in recent years⁴². In addition a large number of the State-owned enterprises of various sizes have been leased or contracted out for operation by collectives or individuals responsible for profits and losses⁴³. Adding to the growing diversification of economic actors, a number of enterprises from different regions, including private enterprises have combined, forming lateral economic associations with different and mixed forms of ownership⁴⁴.

4. Establishment of Special Economic Zones

In 1979, China decided to establish Special Economic Zones (SEZs) in Guangdong and Fujian Provinces⁴⁵. The SEZs were designed to serve as "windows for technology, management, knowledge and foreign policy",

and as experimental ground for the economic reform and development of the PRC⁴⁶.

At present, there are five SEZs, including Shenzhen, Zhuhai, and Shantou in Guangdong Province, Xiamen in Fujian Province, and the whole Hainan Province. The characteristics of the SEZs are as follows:

- (a) a more favourable climate for foreign investment is created including the preferential tax treatment, better public facilities and so on;
- (b) the manufactured goods are intended to be exported; and more importantly,
- (c) the operation of the SEZs is in a manner similar to a free market economy.

The market forces play a dominant role in the SEZs. Foreign investment enterprises (joint ventures and foreign subsidiaries), whose outputs in Shenzhen, Zhuhai, Shantou and Xiamen account more than half of the total industrial outputs of these four Zones⁴⁷, together with other Chinese enterprises in the SEZs have their freedom in operating their business.

5. Reform of Foreign Trade System

Traditionally, China's foreign trade system has been highly restrictive and protective ever since the establishment of the Peoples' Republic. The main characteristics of such system include:

- (a) State-monopolised foreign trade, only state-owned enterprises, not any other enterprises, were empowered to undertake foreign trade business;
- (b) very few (12 national import and export companies to the date of 1978) companies were designed to undertake foreign trade business in a clear intention of ending internal competitions;
- (c) there was an absolute separation between the domestic market and the international market, no contacts between domestic manufacturers or other end-users and the international market, and no relations between domestic prices and international prices;
- (d) there was a mixture function of foreign trade enterprises of administration of foreign trade and managing the business. It not only would sign the trade contract, but would also ensure license and make foreign trade plan (which would then be a part of national plan);

- (e) the foreign trade enterprises were not run for profits, but to fulfil the targets set by the State plan, and sometimes to implement foreign policy⁴⁸.

This traditional foreign trade system, largely copied from the Soviet Union, has been fundamentally changed since the 1979 reform. The reforms on the foreign trade system have mainly been undertaken in the following areas:

(1) The reform of the foreign trade planning system

China regards the import-export plan as an important means of macro-economic guidance and for the smooth development of foreign trade. Before 1979, the import-export plan was compulsory in nature, it attained legal effect, and had to be fulfilled. Through the import-export plan, the government could directly control foreign trade⁴⁹. Since 1979, the totally mandatory foreign trade planning has been replaced correspondingly by mandatory planning, guidance planning and adjustment through market forces. A guidance plan has no legally compulsory nature, and it functions by economic levers. Up to 1984, there were over 3,000 items of products under a mandatory foreign trade plan, such items have now been reduced to just over a dozen as a result of continuing economic reform⁵⁰, all others are either under guidance plan or under adjustment through market forces.

(2) Reform of Foreign Trade Monopoly

China's reform on the foreign trade system began mainly by decentralising the management of foreign trade. Instead of the highly centralised management by national foreign trade enterprises under the Ministry of Foreign Trade, foreign trade enterprises of various levels have been established in order to break foreign trade monopoly⁵¹. Up to 1988, over 5000 import-export corporations had been approved by the Ministry of Foreign Economic Relations and Trade (MOFERT)⁵². In addition, some large and medium-sized manufacturing enterprises are empowered to engage in exporting their own products and importing raw materials for their own use⁵³. Joint ventures and foreign subsidiaries are also entitled to export their products and imports capital goods⁵⁴. State foreign trade monopoly by a few national import-export corporations has been changed. Various business channels have emerged in the course of foreign trade reform.

(3) Reforms of Foreign Trade Administration

While decentralising the foreign trade operation, the Chinese government decided in 1984 to further reform the foreign trade system to improve macro-economic control and the administrative system, ie, to rationally regulate foreign trade mainly by making use of exchange rates, customs duties, taxes and credits⁵⁵.

The MOFERT and its subordinate departments (or commissions) of the provinces, autonomous regions and municipalities exercise

administrative control over foreign trade. The MOFERT is the functional department of the government of the country in charge of external economic relations and trade⁵⁶. It is responsible for making and amending regulations; drawing up long-term and annual import-export plans; organising bilateral and multilateral trade negotiations; concluding trade agreements; approving the establishment of foreign economic and trade enterprises; exercising import and export licensing system, and engaging in international market research and exchanging and disseminating information. The local departments of foreign economic relations and trade administer and supervise foreign trade of the area under their respective jurisdictions in accordance with the authorisation of MOFERT⁵⁷. Establishment of provincial and municipal foreign trade enterprises should be approved by the department of foreign economic relations and trade of the province concerned with prior consent from and reporting to the MOFERT for recording purposes.

(4) Reform of tariff system

Instead of direct control of foreign trade, China gradually starts to employ economic levers, such as customs duties, to indirectly regulate foreign trade. In order to encourage export, and ensure to the import of the high technological products which China is unable to produce, or is insufficiently supplied domestically, China adopts a principle that duty-free or low duty rates shall be applied to the above-mentioned products, whereas to those products which can

be produced domestically or which are not essential for the national economy and people's livelihood, higher duty rates shall be applied⁵⁸.

China also adopts a system of two sets of import duty rates, that is, a set of minimum duty rates and another set of general duty rates. The minimum rates apply to the imports originating in the countries with which China has concluded trade treaties or agreements containing most-favoured-nation clauses; whereas the general rates apply to imports originating in the countries with which China has not concluded such trade treaties or agreements⁵⁹.

It is submitted that although China's policy of its customs tariff may be consistent with its level of economic development, the reform on the tariff system should go further to enable it to be consistent with GATT provisions as China is applying GATT membership, particularly if China wants to apply a customs tariff commitment as a major commitment for exchange of the membership.

(5) Licensing System

The reform of the licensing system is also under way. First of all, as the licensing is a more viable measure than, for example, foreign exchange control in international trade, and is commonly used in the international community, China now is using licensing to regulate foreign trade, which was not necessary during the period when a State foreign trade plan had the nature of a mandatory order which had to be obeyed. China regards the licensing system as an important

means to ensure the smooth development of foreign trade. It applied import licensing to 42 kinds of commodities, the value of which accounts for about one third of the total value of China's imports⁶⁰.

Secondly, although China's licensing system is not an automatic one, no general and specific quotas have been imposed on the imports. The insurance of license depends on the availability of foreign exchange, and the foreign trade policy and plan.

Thirdly, the MOFERT is the State body responsible for issuing import licenses. Nine items are restricted to be issued by the MOFERT itself only⁶¹. All other products, if import licensing is required, the MOFERT, its special commissioner offices in Shanghai, Guangzhou, Tianjin and Dalian (four most important ports in China), and provincial departments of foreign economic relations and trade may issue the licenses. The decentralised administration of licensing may help to relax foreign trade control⁶². Some parts of China are adopting the practice of auctioning its quoted licences in textiles which gives foreign trade companies a chance to compete for the licences.

As an administrative means, the licensing system has functioned as a barrier to international trade and although there are no specific quotas for particular products, the Chinese government administers the license rather arbitrarily. It is desirable to further limit the number of items requiring import and export licences in order to enable China's foreign trade system to be consistent with its more

marketised economy, and also to be consistent with the GATT provisions.

(6) Foreign Exchange Control

China exercises centralised control over its foreign exchange. That is because of China's developing economy, and its shortage of foreign exchange. Since 1979, however, China has gradually reformed its foreign exchange system. First, the system of total allotment of foreign exchange by the State has been replaced by a retention system. In 1979, the State began to grant foreign exchange quotas, within which foreign exchange can be purchased by those local authorities and enterprises that have sold their foreign exchange earning to the State Administration of Exchange Control or its branch offices, in proportion to the amount of their sales according to the State regulation. They keep foreign exchange quota accounts respectively with SAEC or its branch offices and can purchase foreign exchange from a State bank to meet their needs within the specified scope of usage. This measure helps strengthen the vitality of enterprises, enlarge their decision-making power regarding importing from abroad and bring their initiative into full play⁶³.

In line with the foreign exchange control reform, some sort of foreign exchange dealings have been permitted. Because of the foreign exchange retention system, some enterprises might have surplus foreign exchange quotas, while others might be in need of foreign exchange. To facilitate the flow of surplus foreign exchange quotas between

enterprises so as to invigorate the economy, enterprises with surplus quotas are permitted to sell the surplus to those enterprises that need foreign exchanges. However, direct dealings of foreign exchange between enterprises are restricted, and the selling and buying shall be conducted through SAECs or the Bank of China⁶⁴. Eventually foreign exchange adjustment centres have been set up across the country. Foreign investment enterprises and selected State-owned enterprises are allowed to buy and sell their foreign exchanges at the market price in these centres⁶⁵. Those qualified enterprises can use their RMB currency to buy hard currencies if they so need. The establishment of foreign exchange adjustment centres has greatly relieved griefs of foreign exchange shortage in some enterprises.

However, China's foreign exchange control system is still highly central controlled, although it is acceptable to the IMF according to China's level of economic development, it shall nevertheless be further reformed. For example, more enterprises and individuals shall be allowed to enter into the foreign exchange market in order to enable them access to foreign exchanges. Because the Renminbi (Chinese currency) is a non-convertible currency, the exchange rate of the Renminbi is fixed by the SAEC. Such a system should also be further reformed in accordance with the reform of whole economy.

The above analysis shows that China is no longer a traditional non-market economy country; market force now plays an important role in distribution of resources, and in its international trade.

C. Classification of China as a Non-Market Economy by the EEC

In the EEC international trade framework, China has been classified as a non-market economy country (or State-trading country). As discussed above, the concept of non-market economy is not an accurate one in describing the economic system in China any more. This over-simplified classification fails to address the situation of the changing economic structure and system for countries like China. The international trade system based on such hypothesis is unfair and unrealistic. The fundamental core of such classification is that it hides the reality that China is a developing country. The Community, therefore, deprives China of the rights she ought to enjoy as a developing country.

The Community's method of deciding NME has further compounded the unfairness of the treatment towards China. The Community institutions had neither set the criteria of the NME, nor said anything publicly on the irrationality of the NME; what the Community has done in deciding which country is a non-market economy is simply to produce a list of countries which give no definitions or clarification at all. In such a way the Community had as early as 1970 singled out 12 countries as State-trading countries⁶⁶. In 1974, when the trade agreements between Member States of the Community and the countries concerned were due to expire at the end of 1974, the Council of the Community decided to make the point that it was ready to negotiate new agreements with State-trading countries, by forwarding an outline agreement to the countries involved⁶⁷. In its anti-dumping regulations, the Community

again simply referred to countries which had been addressed by Regulations of (EEC) No. 1765/82 and 1766/82 as State-trading countries⁶⁸.

The Community's approach of enumeration has the advantage of relieving the Commission from the burden of having to determine in each case whether it considers certain countries to be non-market economies. But such an approach has obvious disadvantages insofar as the interested countries are concerned. First, there is a lack of objective criteria and careful analysis of a particular economy; the decision is arbitrary, without granting the country concerned a chance to discuss or contest. Secondly, it is less flexible and less adaptable in reflecting changes in the economic structure and system of the countries concerned. This is particularly true taking into consideration changes in the economic structure and system in China over the last ten years. Consequently, this rigid approach and inability to respond to changes in the countries concerned has made the Community become increasingly apparent of protectionism and discriminatory against China. The failure of recognising China's changes in its economic structure in the EEC side not only discourages trade and economic relations between China and the EEC, but may also discourage China's further development towards a more market orientated economy.

International trade law, particularly that applied by the European Community, has so far failed to develop rules to deal with countries such as China. There is little rule in the GATT to deal

with State-trading countries, and there is no objective criteria in international trade law to define what is a non-market economy and what is a free market economy in international trade. It leaves, therefore, great discretion for the Community to decide how to deal with China. By putting China into the category of non-market economy, the Community is able to accord China with less favour than even non-member developed countries despite the fact that China is a developing country. By adopting the approach of enumeration, the Community has failed to respond to China's changes over the last ten years.

The classification of China as a non-market economy is, of course, not a purely legal or economic issue. It is also a political issue. That explains why Yugoslavia has been classified as a free market economy, but Hungary or China has not. Only the change of policy by the governments of the Member States of the European Community would change the Community's position in this regard. Such a decision would certainly reflect a general policy choice rather than a decision based on legal arguments. Until the Member States consider that, China will still be classified as a State-trading country, and thus continue to be treated with unfavorable discrimination.

D. Conclusion

The concept of non-market economy is not an accurate description

of the economic reality in the countries concerned, nor has it sufficient ground to enable the legal framework of international trade involving the parties in question to be built on such hypothesis.

The over-simplified concept fails, in particular, to address the economic reality in countries like China, which is a developing country on the one hand, and is undertaking economic reform on the other. By reforming its State plan, ownership and management of enterprises and the foreign trade system, China is on its way to a more mixed economy.

The Community's methods of deciding NME have further compounded the unfairness of treatment towards China. By enumerating the countries as NMEs, the Community does not give the countries concerned a chance to contest; such a way also lacks flexibility in responding to the changes taking place in China.

By categorising China as a NME, the Community is able to accord China with less favourable terms in bilateral trade than other non-member countries, therefore, depriving the right China ought to enjoy as a developing country.

Footnotes (Chapter II)

- (1) See the country classification of the Bulletin of the European Community. China is always under the heading of State-trading countries.
- (2) The agreement was concluded on the basis of outlines the Community put forward to State-trading countries in 1974. Bull. 1E.C. 11-1974 P.13 Point 13.01.
- (3) See discussions in the following Chapters.
- (4) J.H. Jackson, Legal Problems of International Economic Relations. P1174.
- (5) Ibid.
- (6) Supra. 1 and 2
- (7) See the trade agreement concluded by China and the European Community in 1978, and discussions in Chapter III below.
- (8) R. Carbaugh, International Economics p180 (1985); Stephen Gardner, Comparative Economic System pp14-27 (1988); and K. Kennedy, The Accession of the Soviet Union to Gatt 21 JWTL p25 (1987).
- (9) Ibid.
- (10) See Berman and Bustin, The Soviet System of Foreign Trade in Business Transaction, with the USSR p55 (R. Starred 1975).
- (11) J. Spero, The Politics of International Economic Relations Pibo (1985); and Kanji Haitani, Comparative Economic System p3 and p115 (1986).
- (12) Ibid.
- (13) Supra 8.
- (14) Haitani and Gardner.
- (15) Ibid.
- (16) Ibid.
- (17) See Chapters IV and V of the European Coal and Steel Community, 1951.
- (18) M.M. Kostecki, State-Trading in Agricultural Products by the Advanced Countries. In State-trading in International Markets p5 (Kastecki ed, 1982).

- (19) In India, for example, the government exercises extensive controls over resource allocations. See Gregory and Stuart, Comparative Economic System, Second Edition p359 (1985).
- (20) Ibid, and S. Gardere, Supra 8, K. Haitani, Supra 11.
- (21) Haitani pp341-367, and Gardner pp391-398.
- (22) Ibid.
- (23) Chow, Gregory C., The Chinese Economy, New York: Hagsor & Row, 1985. World Bank, China: Socialist Economic Development. Washington D.C.: The World Bank, 1983 Vols. 1-3.
- (24) Ibid.
- (25) Part IV of Decision of the Central Committee of the Community Party of China on Reform of the Economic System. 27 Beijing Rev. (October 24, 1984).
- (26) Victor Li, Law and Politics in China's Foreign Trade, 1977 N.Y.
- (27) Zhao Zhi Ya, Report to 13th Chinese Community Party Congress and Supra 25, Part VII.
- (28) Ibid.
- (29) Ibid, also supra 23.
- (30) Supra 23, Chow and Supra 8 Gardner.
- (31) Liu Guo-Guang, China Socialist Economy and Its Reform, 1989, Beijing.
- (32) Ibid.
- (33) Ibid.
- (34) Yu Shou Qi, Enterprises Contracting Management System, China Economic Press 1988, pp16-37, Beijing.
- (35) Ibid, and Research Group of China Enterprises Reform: Enterprise Contract Management System in Practising. Economic Management Publishing House, 1988, Beijing.
- (36) Ibid.
- (37) Ibid.
- (38) Ibid.
- (39) Ibid.
- (40) Supra, 35. Part VII.

- (41) Peoples' Daily, 12th August 1989.
- (42) Peoples' Daily, 11th August 1989.
- (43) Supra 35.
- (44) Supra 27.
- (45) The decision was made at the Second Session of the Fifth NPC in June 1979.
- (46) People's Daily, 20th September 1987 and 12th September 1988.
- (47) Beijing Review 30th September 1985 P4 and China Daily 17th February 1986.
- (48) Supra 23 and 26.
- (49) Ibid.
- (50) Questions and Replies concerning the memorandum on China Foreign Trade Regime. GATT L/6270 27 November 1987, p84.
- (51) Wen Wei Pao (Hong Kong) 28th July, 1989 and Ibid.
- (52) Beijing Rev. Vol.32, No. 33, p7, August 14th-20th, 1989.
- (53) Ibid.
- (54) The Law of the People's Republic of China on Chinese-Foreign Joint Venture. Article 9.
- (55) Supra 25.
- (56) Jamie P. Horsley: The Regulations of China, Foreign Trade, in Michael Mozer ed. Foreign Trade Investment and the Laws in The People's Republic of China. p9.
- (57) Ibid.
- (58) China, Status as a Contracting Party, memorandum on China's Foreign Trade Regime. GHTT L/1625 18th February, 1987, p13.
- (59) Ibid.
- (60) Ibid p17.
- (61) Ibid p18.
- (62) Supra 47 p85.
- (63) Supra 55 p20.
- (64) Ibid.

- (65) See International Financial Law Rev. November 1988, p23.
- (66) O.J. Nolig, 26.1.1970, p1. These twelve countries include Albania, Bulgaria, Czechoslovakia, GDR, Hungary, Mongolia, North Korea, China, Poland, Romania, the USSR and Vietnam.
- (67) Bull. EC. 11-1974, p13 point 1.3.1.
- (68) Twelve countries listed in these two Regulations. See note 63.

CHAPTER III

LEGAL REGIME UNDER THE 1978 TRADE AGREEMENT

- A. The MFN Clause
- B. Balance of Trade
- C. Safeguard Clause
- D. The Joint Committee
- E. Other Issues
 - a. The Price Clause
 - b. Promotion of Contacts and Exchanges
 - c. Protection of Intellectual Property
 - d. Arbitration

CHAPTER III

LEGAL REGIME UNDER THE 1978 TRADE AGREEMENT

After more than two years of discussion and negotiation a trade agreement between the European Economic Community and the People's Republic of China (the "Agreement") was concluded on April 3, 1978. The Agreement outlined the general legal framework for Sino-EEC bilateral trade relations. Although the scope of the Agreement was limited, and certain key issues had not been addressed, it represents the first occasion on which the EEC and China have made an effort to establish a legal regime for bilateral trade. In fact, the Agreement represents a breakthrough. For the Community, this is the first trade agreement to be concluded with a State-trading country; the political and economic importance should not be underestimated. For China, the European Community is not only an increasingly important and reliable trade partner, but also an increasingly important balancing power outside the super-power poles. The Agreement ensured the healthy development and rapid increase of bilateral economic exchanges. It was the most important development following the establishment of an official relationship between China and the European Community in 1975. This chapter will analyse the principal features of the Agreement in the context of the legal regime which governs it, comparing this Agreement with trade agreements between China and other

countries, and trade agreements between the Community and other countries. The discussion, among others, includes a consideration of the MFN clause, the balance of trade provision, the safeguard clause and the establishment of the Joint Committee.

A. The MFN Clause

1. History

The concept of the Most-Favoured-Nation (the "MFN") clause was not new to the Chinese. In the course of their attack on the Chinese Empire in the last century, the Western nations, led by Great Britain, as well as Russia and Japan, used the unilateral MFN clause to gain privileges and concessions, such as the granting of territory through lease arrangements and extraterritorial jurisdiction¹. This was regarded by the Chinese people as a malevolence perpetrated against China². However, the MFN clause has been utilised by the People's Republic of China in the 1950s, 1960s and early 1970s, to circumvent discriminatory policies by some countries³, in particular to surmount the embargo imposed upon China by the United States⁴, and further to expand foreign trade from the late 1970s.

2. Features of the Clause

In the 1978 EEC-China Trade Agreement, a MFN clause was incorporated, enabling parties to accord each other the MFN treatment. Article 1, Paragraph 2 of the Agreement provides:-

"In their trade relations, the two Contracting Parties shall accord each other most-favoured-nation treatment in all matters regarding:-

- (a) customs duties and charges of all kinds applied to the import, export, re-export or transit of products, including the procedures for the collection of such duties or charges;
- (b) regulations, procedures and formalities concerning customs clearance, transit, warehousing and transshipment of products imported or exported;
- (c) taxes and other internal charges levied directly or indirectly on products or services imported or exported;
- (d) administrative formalities for the issues of import or export licences."⁵

According to the Agreement, the MFN treatment between China and the Community does not cover the privileges extended to other countries under international commodity agreements; advantages

accorded to states which, together with the Community or China, are members of a customs union or free trade area; and the special treatment towards the territorial neighbourhood⁶.

2.1 Restrictions

This MFN treatment clause is highly restrictive compared with the GATT MFN obligations, which include "any advantages, favour, privilege or immunity."⁷ The exclusion in the MFN clause of favoured treatment to other members of customs union or free trade area, or to neighbouring countries has effectively prevented China from benefiting, not only from the GATT member benefits, but also from all advantages and favours the Community has granted to, for example, ACP countries under the Rome Convention⁸, EFTA countries⁹ and Mediterranean countries¹⁰. Since all main trading countries, including industrialised countries and developing countries (except some Eastern European countries), are included in various global or multilateral or bilateral arrangements, by which these countries get one or another trade advantage, China is in fact being put in a most disadvantageous position in trading with the Community¹¹. Although China demanded, in the negotiations, that the European Community MFN treatment should be extended to China in the same way as to the GATT countries, the Community has successfully persuaded China to accept a less open MFN treatment clause on the ground that China was not a member of the GATT¹².

The scope of the MFN clause in the 1978 EEC-China Trade Agreement is narrower than that of the 1974 China-Japan Trade Agreement¹³ and the 1979 China-USA Trade Agreement¹⁴. In the 1974 China-Japan Trade Agreement, for example, in addition to the MFN treatment in areas as provided in the EEC-China Agreement, Article 2 also ensures the MFN treatment reciprocally in connection with the exemption of tariffs, domestic taxes and other surcharges for six categories of commodities brought only temporarily into the territory¹⁵. The China-Japan Trade Agreement also grants the MFN treatment to the commodities of the other signatory party in transit whenever the said commodities are transported by the other party through the territory of the party concerned to the territory of a third party¹⁶. Furthermore, in respect of matters concerning payments, remittances and transfers of funds each contracting party agrees not to treat juridical and natural persons of the other party less favourably than juridical and natural persons of any third country¹⁷.

The MFN clause contained in the 1979 China-USA Trade Agreement covers the same ground as that covered in the EEC-China Trade Agreement. However, it also includes "all laws, regulations and requirements affecting all aspects of internal sale, purchase, transportation, distribution or use of imported products."¹⁸ The China-USA Trade Agreement also provides that, in the event of either contracting party applying quantitative restrictions to certain products originating in or exported to any third country or region, it shall afford to all like products originating in or exported to the other country treatment which is equitable to that afforded to such

third country or region¹⁹. Moreover, the agreement incorporates a provision to the effect that the contracting parties agree to offer reciprocal concessions with regard to trade and service, particularly tariff and non-tariff barriers to trade²⁰.

In comparison with these two agreements, the most striking restriction in the EEC-China Trade Agreement is that, notwithstanding the MFN treatment, the European Community is still imposing a discriminatory quantitative restriction on a substantial number of products originating in China²¹. The MFN treatment, coupled with a substantial number of imports subject to quantitative restrictions, ironically has, therefore, been completely diluted and extremely limited.

In its trade agreements with other developing countries, the European Community has taken a more sympathetic and liberal attitude, not mentioning the generous trade advantages to 66 developing ACP countries. In trade agreements with two leading developing countries, India and Brazil, for example, the European Community has accorded a full scale of GATT MFN treatment²², without adding a special list of products which are subject to quantitative restrictions, and which are discriminatory only to each of them. Even in the Trade Agreement with Romania, a country which is also classified as a State-trading country (concluded in 1980 in industrial products), a special reference to the GATT provisions was made in order to enable Romania to enjoy the GATT MFN treatment subject to the conditions in the Accesses Protocol²³.

The limited scope of the MFN clause in the EEC-China Trade Agreement is, on the face of it, because of China's non-membership of the GATT. But in reality it reflects the Community's worries about the possibility that China can produce massive amounts of low-priced products with its rich natural resources and very cheap labour and particularly because of China's economic system, and the difficulties faced by the Community producers in penetrating the Chinese market even with the MFN treatment.

2.2 Reasons for the Restrictions

The Community's hesitation and restriction is in some ways understandable. Indeed, the Community has good reasons to restrict the MFN clause to the extent which is acceptable to it, because the operation of the MFN clause in relations between a market economy and a non-market economy is not a simple matter.

The MFN clause was devised to frustrate discrimination between goods of different origin competing in essentially free markets by assuring equal treatment as regards customs, taxation and cost of transportation, inasmuch as these matters are controlled by government. The MFN clause presumes a comparable level of government intervention in counterpart countries so that imports from countries covered by the clause would have a fair chance to compete. But the clause works differently in a typical non-market economy country where, instead of the market force, imports and exports are controlled by the plan which determines types, origin and distribution of goods,

thus in practice minimising the element of competition²⁴. Although China is now reforming its economic system and is moving towards having a mixed economy, when the EEC-China Trade Agreement was negotiated and concluded, however, China was a typical non-market economy²⁵.

Theoretically, the control of the Community (and its Member States) over matters of commerce was less pervasive than that exercised in China. The Chinese government, to some extent, was able to control the sale, distribution, storage and use of the goods imported from the Community, whereas in the Community, these same aspects of trade operations were the responsibility of the Member States' buyers and importers. The Community and the Member States were generally unable to prescribe methods for storing, use, sale or distribution of Chinese commodities.

Furthermore, when the tariff on imports from China was reduced in the Community, the likely consequence (provided other conditions remained constant) was that importers and buyers in the Community would increase their purchases from China. By contrast, decisions on imports in China were not only affected by tariff reduction, but also by the State plan, the availability of foreign exchange and sometimes even by political considerations²⁶. All the above discussions show that the European Community has sufficient grounds to take a more restrictive attitude towards China. However, the Community in this regard has failed to address two important issues. First, China is a developing country. Some measures adopted by China in its economic

operation, and particularly in its foreign trade operation, are not far different from what other developing countries are doing²⁷. To accord China the same treatment as to the USSR is actually depriving China, as a developing country, of the rights she ought to enjoy in international trade²⁸. Secondly, over the last ten years, China's economic system, including the foreign trade system, has undergone a drastic change and to a certain extent the foreign trade monopoly has been broken. The Chinese government has not been able to control foreign trade to the same degree as it did before reform. Chinese exporters and importers must be business-minded and look after their commercial interests themselves. Ironically enough when China decentralised its trade in silks to allow producers and local traders to trade rather than the China National Silk Import and Export Corporation to have a monopoly as it traditionally had done since 1949, it was the Europeans who protested to China and requested the Chinese Government to recentralise the silk trade in order to get more and more of the scarce resources and to keep the price stable²⁹. Legal mechanics adopted in the Trade Agreement (and the subsequent Trade and Co-operation Agreement) have so far failed to respond to these changes. The mechanics, based on the Community's proposal, are a combination of an old approach and a new form of compromise.

2.3 Different Forms of the Commitment

As early as 1927 a model form of commitment to purchase specific amounts of particular commodities over a fixed period, as a supplement to the MFN clause, was introduced in the Soviet-Latvian Commercial

Treaty³⁰. This model has been applied in other agreements, for example, in the 1975 US-Soviet Union Grain Agreement³¹ and the 1980 US-Chinese Grain Agreement³². But more often than not, in the trade agreements between the market economy countries and the non-market economy countries, a general MFN clause on the framework of tariff matters will be included, plus a general promise from the non-market economy to increase or promote bilateral trade. There is normally no inter-governmental determination of what will constitute the bilateral trade³³. This is the approach adopted by the China-USA 1979 Trade Agreement³⁴. By contrast, the China-Japan long-term Trade Agreement, concluded in the same year as the EEC-China Trade Agreement, has followed a different route³⁵. This agreement is based on the spirit of the China-Japan Communiqué of 1972³⁶ and the China-Japan Trade Agreement of 1974³⁷. The agreement provides for each party to sell \$10 billion of specified goods to the other and to buy \$10 billion of specified goods from the other over the period between 1978 and 1985³⁸. What made the agreement a breakthrough is the commitment by each side to make the scheduled purchases from the other³⁹. The agreement was not, however, inter-governmental, although it was signed on both sides by government-related officials. The agreement nevertheless had the clear support of the two governments⁴⁰. The relationship between the business world and the governments of the Member States of the Community, or the Community itself is far less close than the relationship between the business world and the government of Japan. It is almost impossible for the Community to conclude a trade agreement of this kind with China. It is also beyond the competence of the Community to make a concrete commitment to buy

and sell specific commodities in specified amounts over a fixed time (except in relation to textiles, which will be discussed later). Arguably, such practice is also inconsistent with GATT principles. It will be one of the concerns for the GATT contracting parties in negotiating China's membership. It is submitted that such practice should be abolished or conducted within the GATT rules once China has resumed its membership in the GATT.

Thus, in the 1978 EEC-China Trade Agreement, a general framework with a highly restrictive MFN clause is adopted. The Community in this respect acts on the quantitative restriction of goods imported from China on similar lines to the quantitative restriction against other State-trading countries, notwithstanding the MFN treatment clause in the Trade Agreement⁴¹. A clear provision to prevent discriminatory quantitative restrictions, which was included in the 1979 China-USA Trade Agreement⁴², does not appear in the EEC-China Trade Agreement. Instead, the European Community promises to strive for an increasing liberalisation of imports from China. "To this end it will endeavour progressively to introduce measures extending the list of products for which imports from China have been liberalised and to increase the amount of quotas"⁴³.

As discussed above, a simple MFN clause with a tariff concession in a trade agreement between a non-market economy and a market economy may not work in the normal way. In return for the limited MFN treatment and the commitment to a progressive liberalisation of imports and raising the ceiling of quotas from China by the Community,

China promises to give favourable consideration to imports from the Community. "To this end the competent Chinese authorities will ensure that Community exporters have the possibility of participating fully in opportunities for trade with China."⁴⁴

3. Implications and limitations of the MFN clause

3.1 Implications

There was an allegation that "the most-favoured-nation clause cannot achieve an increase in trade" when it involves non-market economy countries⁴⁵. This allegation seems questionable. It is not supported by relevant experiences. First of all, the MFN treatment does help to increase trade between the parties concerned. The reduction of tariffs not only enables the importers in the market economy countries to import more, but also enables the foreign trade corporations in the non-market economy country to import more (although this increase may prove to be modest) subject to other conditions such as the availability of foreign exchanges. Secondly, in a decentralised non-market economy country, such as China, the monopoly on foreign trade is decreasing. Corporations involved in foreign trade are independent legal persons which must learn to be business-minded and responsible for their own profits or losses. So tariff reductions on imports matter increasingly. Indeed, these corporations are always on the lookout for foreign suppliers with more competitive commercial conditions. Thirdly, even though the government of a non-market economy country plays a more prominent role

than that of a market economy country in respect of bilateral trade, an MFN treatment clause demands a certain approach. This should create a better chance for increasing bilateral trade than if MFN treatment were not required.

The MFN treatment between the European Community and China is therefore not only politically important for both parties, but also important for improving bilateral trade relations and economic co-operation.

The most significant effect of the MFN treatment as set out in the Agreement will be the removal of existing discriminatory tariff barriers. This will have striking implications for at least some products. The MFN treatment also paves the way for further development of bilateral trade and economic co-operation between the EEC and China. Since the Trade Agreement was concluded, there has been an enormous increase in trade between the Community and China⁴⁶.

3.2 Limitations

The MFN treatment clause as such nevertheless has limitations. Its economic importance is diluted by its restrictive nature and by the fact that the Community still imposes quantitative restrictions on many Chinese products. As far as China is concerned, the control of foreign exchange is a more effective way of controlling foreign trade. European exporters, therefore, will still face difficulties in entering the Chinese market. On the other hand, the removal of the

discriminatory tariff by the Community may have only a modest overall effect on the level of Chinese exports to the EEC at this stage, since China is still a developing country. The large bulk of these exports will no doubt continue to consist of raw materials, primary products and semi-manufactured products, to which tariffs are not a significant obstacle. Similarly, Chinese manufacturers may continue to find it difficult to penetrate the EEC markets, even after the MFN treatment is provided, unless the Community removes its restrictions on imports from China and provides more favourable terms for imports from China.

The commitments made by both sides in Article 4 of the Agreement may also prove to be contentious⁴⁷. On the EEC side, it promises to strive for an increasing liberalisation of imports from China, but how, when and to what extent? All these are left to be decided by the European Community. Action is then taken unilaterally. The Community may increase quotas and introduce measures extending the list of liberalised products substantially as it did during the first two years after the Trade Agreement⁴⁸. However, it is open to the Community to do little about the quotas and the liberalisation of the products. This was the 1980-1983 EEC trade policy towards China. On the Chinese side, it promises to give favourable consideration to imports from the Community but, again, what does this mean? According to the agreement the "favourable consideration" commitment is unilateral, and this is borne out by China's trade policy. In 1980, for instance, when China faced difficulties in its internal re-adjustment, it reduced the rate of growth of trade with the Community.

The provisions of Article 4 seek to avoid possible disadvantages to the contracting parties in bilateral and multilateral trade relations and to increase trade. The inclusion of Article 4 was hailed as "the first time such a clause has been incorporated in a trade agreement."⁴⁹ However, the commitment under these provisions involves basically unilateral action and allows great elasticity. What is entailed very much depends on the balance of payments and the economic environment generally of both sides and on the bargaining power in future negotiations. In this regard, the Agreement has failed to provide a more concrete, less unilateral, and therefore more meaningful commitment to promote trade between them. A provision like this is far from legally binding (see discussions in the next Chapter). The operation of bilateral trade depends on each party's goodwill, on the one hand, and on the discussions and negotiations in the annual Joint Committee meeting established under the Agreement, or through other channels, on the other.

Furthermore, the arrangement in Article 4 throws international trade back to the stage of bilateralism and barter, which is inconsistent with the MFN spirit and also contradictory to the GATT principles. It places other trading partners with China in a disadvantageous position vis-a-vis the European Community if the promise of "favourable consideration" has to be fulfilled. As China is now applying for membership of the GATT, such an arrangement will be reviewed in accordance with the GATT principle of non-discrimination. Indeed the whole Trade Agreement will be reviewed under the GATT rules. The real battleground for establishing a more

committed, legally binding trade regime in trade with China is on the negotiating table in the GATT. The arrangement in the EEC-China Trade Agreement, therefore, is a temporary transient one.

Conclusion

1. The MFN treatment in the Trade Agreement is the cornerstone of the EEC-China bilateral trade. The granting of such treatment has both economic and political importance. It aims to expand trade and economic relations, and to strengthen good political relations. It has achieved its aims in such a way that it has promoted bilateral trade and economic relations and it has strengthened both parties' economic and political relations.

2. However, the MFN clause in the Trade Agreement is highly restrictive. It excludes, for example, the favourable treatment to other members of custom union or free trade area, or to neighbouring countries. Because of the very nature of the Community's trade policy, the Community granted advantages to EFTA countries, to ACP countries and to Mediterranean countries, but because China is not a member of the GATT, she has effectively been excluded from all these trade advantages that the Community grants to its trading partners. China is, therefore, in a most disadvantageous position in trading with the Community.

3. Furthermore, apart from the relatively disadvantageous position vis-a-vis other trade partners, even more strikingly, the

Community still imposes discriminatory quantitative restrictions on a substantial number of imports from China. The MFN treatment, therefore, has been completely diluted and extremely limited.

4. The ironic discriminatory application of MFN treatment is, on the face of it, because of China's non-membership of the GATT. But in reality, such a policy reflects the Community's worries that China may be able to produce massive quantities of low-priced products with its rich natural resources and very cheap labour, particularly because of its economic system. Thus, the restrictive application is not only for economic reasons, but also for political reasons.

5. In order to remedy the situation, the European Community promises to introduce measures extending the list of products not subject to quantitative restrictions, and to increase the amount of quotas. China, on the other hand, promises to give favourable consideration to imports from the Community, and to ensure that Community exporters have the possibility of participating fully in opportunities for trade with China. Such an arrangement, it is submitted, is subject to unilateral action on both sides, and allows great elasticity. In the end, the discussions and negotiations in annual joint committee meetings may play a decisive role in annual trade arrangements. Furthermore, such an arrangement is inconsistent with the GATT principles. Once China joins the GATT the whole arrangement has to be reviewed. In this respect such an arrangement is temporary. The real battleground for establishing a more committed trade regime with China is on the negotiating table in the GATT.

B. Balance of Trade Clause

The 1978 EEC-China Trade Agreement also incorporated a special clause to attain balance in their trade. Article 3 of the agreement stipulates that the two contracting parties will make every effort to foster the harmonious expansion of their reciprocal trade and to help, each by its own means, to attain a balance in such trade. It is agreed that should an obvious imbalance arise, the matter must be examined by the Joint Committee, which will be established in accordance with the agreement, so that measures can be recommended in order to improve the situation⁵⁰.

China's foreign trade strategy was and still is to maintain its capacity to be able to pay for its growing import requirements through increased exportation⁵¹. Since China is a developing country, export accounts for China's main foreign exchange earnings; and because the Chinese currency is not convertible, foreign exchange earnings, to a large extent, decide its ability to import. From the establishment of the People's Republic in 1949 till 1984 China managed to maintain a basic balance in its imports and exports⁵². However, its trade with the European Community suffered a chronic deficit⁵³. China, therefore, seeks a remedy in the Trade Agreement. The Chinese delegation at the negotiations for the agreement proposed that, in addition to the formal inclusion of provisions aimed at balanced trade, a separate clause should be added under which a corrective mechanism would automatically and promptly come into effect to restore the balance whenever necessary⁵⁴. The Community did not accept this

proposal. In the Community's view, there is no absolute balance of international trade. Trade surpluses or deficits are the natural result of market operation; it is the proper function of market competition. The EEC-China Trade Agreement will not disrupt the market operation. Furthermore, all developing countries are running trade deficits and China should not be an exception⁵⁵. The result of negotiation is a compromise, the final provisions in the Agreement are considerably diluted. Firstly, there are no precise rules to prevent imbalance and, secondly, no binding obligation for the contracting parties to reverse an imbalance. Each of the parties is to attain a balance of trade "by its own means"⁵⁶.

This clause has attracted favourable attention from both sides⁵⁷. However, the effect of the clause is very limited. Bilateral trade during the first five years after the Trade Agreement was roughly balanced⁵⁸, but from 1984 to 1986 China incurred an enormous trade deficit with the EEC. China's deficit in trade with the Community was ECU 298 million in 1984⁵⁹, but in 1985 the amount was as high as US\$3,346.2 million and in 1986 it reached US\$5,464.8 million⁶⁰.

The demand for the balance of trade clause in the Trade Agreement was also inspired by the Chinese experience of trade with Japan. The trade agreement China concluded with Japan in 1974 did not provide any balance expansion machinery⁶¹. Subsequently, China has suffered serious trade deficits with Japan⁶². This lesson led China to insist on a balance of trade clause in the 1978 Trade Agreement with the EEC and with the USA in the following year⁶³.

The balance of trade clause in the Agreement is, again, a result of compromise. It was incorporated on China's insistence. Although its legal and actual effect may be doubtful, it nevertheless serves two functions: first, it gives either party a ground to demand the other party to do something, for example, to increase imports from the other party in order to attain a trade balance; more importantly, it also gives the contracting party a solid ground to attain a trade balance "by its own means", which may include reducing imports from the other party, as China did in 1987, to reduce its trade deficits vis-a-vis the European Community⁶⁴.

It is submitted that in respect of trade balances in general, the Community's view is more acceptable: there is no possibility (and no necessity) to keep an absolute balance of international trade. However, as far as the EEC-China trade reality is concerned, the Community imposes quantitative restrictions on imports from China on the one hand, and the Community enjoys a chronic trade surplus on the other. This is by no means a fair trade practice. The balance of trade clause under such circumstances may seem to be necessary. But the solution, in the author's view, is not to further improve the balance of trade clause to the extent required by the Chinese negotiators, rather, it is necessary to review the whole MFN clause, to revoke the discriminatory quantitative restrictions and to allow the market mechanism to have full play. The relative balance of trade after competition is more healthy. The balance of trade set by the Chinese government or the Commission through administrative means is

inconsistent with the GATT rules, and is against the principle of comparative advantages.

The 1978 EEC-China Trade Agreement also confirms that the contracting parties will do all they can to improve the structure of their trade in order to diversify it further⁶⁵. As China is a developing country, its main exports will initially be primary products, and its imports, manufactured goods. Trade diversification will be beneficial not only for the short-term development of a balance in bilateral trade, but also for promoting China's economic development. It, in turn, serves to develop bilateral trade relations on a more stable basis. But this provision is no more than an expression of goodwill. Under the provisions, the Community does not undertake, in a legal sense, anything at all. Whether the bilateral trade can be further diversified largely depends on the performance of Chinese exporters and, indeed, on China's industrial development.

C. The Safeguard Clause

Not infrequently the safeguard clause becomes the centre of the contention in bilateral and multilateral or global trade arrangements⁶⁶. This was also the situation in the context of the EEC-China Trade Agreement. Only after hard negotiation and compromises on both sides⁶⁷ has a much diluted safeguard clause been concluded in the agreement.

1. The Conclusion of the Safeguard Clause

It is the Community's practice to include a safeguard clause in agreements with non-members following the GATT "escape clause" model⁶⁸. As China is not a GATT member, and is classified by the European Community as a State-trading country, the Community simply could not accept any sort of trade agreement without a safeguard clause. On the other hand China at first resisted the inclusion of a safeguard clause which would permit the Community to take necessary measures in the event of an emergency⁶⁹. China considered that other methods might be available to limit imports from the Community in case of necessity, whereas the Community regarded it as vital to have a safeguard clause in the trade agreement with China in order to re-introduce quotas or take other measures in case of emergency. Of course, under the regime of the MFN treatment, the Community maintains quantitative restrictions on imports from China; it does not give up the right to re-introduce the quotas on products which have previously been liberalised, if necessary. But, with a safeguard clause, the Community's position is consolidated. At the Community's insistence in negotiation a safeguard clause was finally included in the Agreement⁷⁰.

Instead of a GATT-modelled safeguard clause, Article 5 of the Agreement sets up an obligation, at China's insistence⁷¹, that there should be "friendly consultation" before any safeguard measure is taken with regard to any problems that may arise in the implementation of the agreement. There is, however, an exception "where the

situation does not admit any delay". In this event, either contracting party is entitled to take measures, but must endeavour as far as possible to engage in friendly consultation before doing so. It is also provided that when such measures are taken, the general objectives of the agreement should not be prejudiced⁷².

2. Bilaterality and Flexibility

2.1 The European Community has striven for a selective application of Article XIX of the GATT, against Japan particularly, since the negotiations of the Tokyo Round⁷³. Because of resistance from all developing countries and some developed countries of the GATT members, the Community's intention of including a selective safeguard code under the GATT law has not been fulfilled⁷⁴.

The safeguard clause in the EEC-China Trade Agreement, however, is by any standards bilateral and selective, as the Trade Agreement is bilateral and China is not a member of the GATT. The safeguard action taken especially against China in accordance with the safeguard clause could not, therefore, be challenged according to the MFN and non-discrimination principles under the GATT rules. This is an advantage to the party who has strong economic power; in the present case it is the European Community who benefits from such a safeguard clause.

In the negotiations with the GATT on the issue of China resuming its seat in the GATT, the European Community, joined by the United

States, is pushing China to accept a selective safeguard clause in exchange for the GATT membership ticket⁷⁵. Such selective safeguard clauses have been included in the Accession Protocols of Hungary, Poland and Romania when they negotiated their admittance to the GATT⁷⁶. Such clauses may legalise existing bilateral safeguard clauses such as the one incorporated in the EEC-China Trade Agreement, but will considerably reduce the importance of China's resumption of the GATT seat.

2.2 The safeguard clause clearly gives a free hand to either party to take protective measures as a last resort; it leaves various issues open. Some of these issues are crucial. The result of this is that the contracting parties find themselves with great discretion to decide whether or not to take any action.

(a) First, the legal nature and effect of the pre-consultation is vague. On the one hand, the consultation may be regarded as merely a formality, since there is no obligation whatsoever to reach agreement through the consultation. On the other hand, the consultation procedure per se is somehow in doubt, because there is no clear criterion for "situation does not admit any delay." In fact, the Community's internal common rules in implementing the Trade Agreement had totally ignored the requirement of consultation. It authorised the Member States to take protective measures without bothering to consult (see discussion in Chapter V). Furthermore, there is no provision as to the medium through which the consultation should take place. It may be presumed that the consultation is to

take place within the Joint Committee established under the Agreement⁷⁷. However, the Joint Committee normally meets only once a year. Moreover, the safeguard clause, like the constitution of the Joint Committee in Article 9 of the Agreement, contains no detailed procedural rules for the consultation. Freedom to regulate procedure will thus belong to the party who initiates action; a factor which may well weaken the function of the consultation.

In sum, the requirement for pre-consultations is intended to prevent the arbitrary application of the safeguard clause. However, in the context of the whole safeguard clause and the Agreement, the pre-consultation requirement resembles a guard dog without teeth. More specific provisions relating to the consultation are required and, more importantly, clarification is needed of the legal nature and effect of the consultation.

(b) Secondly, the safeguard clause fails to address a vitally important issue, namely, the criteria relevant to the invocation of the safeguard. Because there is no definition of "where the situation does not admit any delay", the discretion, as discussed above, lies with the party who wants to initiate the action.

Under the GATT law, for example, the appeal to the safeguard clause is subject to strict conditions in order to prevent an all too easy resort to protectionist measures⁷⁸. Thus the injury threshold (serious injury) in Article XIX is higher than the one applied in

anti-dumping or countervailing duty investigation (material injury) pursuant to Article VI⁷⁹.

The lack of details of the safeguard clause will allow the party easily to trigger the safeguard action. It is in the Community's interests to give itself great discretion in taking safeguard action in order to prevent any possible market disruption by low-priced Chinese products.

There is only one reported case involving protective measures. This concerned beach slippers which originated in China and were imported into France. According to information supplied by France, the importation of beach slippers from China increased from 600,000 pairs in 1979 to 3,600,000 pairs in 1981, the market share of these imports in France rising from 9.3% in 1979 to 36% in 1981⁸⁰. The average price of Chinese beach slippers is about FFr5.50, while the average ex-factory price of French beach slippers is around FFr9.80⁸¹. The production of French beach slippers fell from 10,400,000 pairs in 1979 to 8,500,000 pairs in 1981, and the employment in the industry, concentrated in the North-West of the country, fell from 2,500 employed in 1979 to 1,900 in 1981⁸². The Commission concluded from the above information that "significant injury" was being suffered by French producers, and that a critical situation existed in respect of which any delay would cause injury which would be difficult to remedy. Immediate intervention was required in the interest of the Community⁸³. Thus, the criterion applied here was "significant injury", caused by the increase of imports and consequent rise in the

market share of Chinese products and the fall in domestic production and employment. In its internal rules the Community uses the term "substantial injury" as a criterion⁸⁴ justifying safeguard action. In fact, the criterion resembles more the injury threshold applicable in the Community's anti-dumping proceedings. The injury threshold applied in the safeguard action relating to Chinese products was lower than the one established by the GATT which requires a proof of "serious injury". Of course, it is arguable that there are not many differences between "serious injury" and "substantial injury"; particularly when either party applies the protective action rather arbitrarily as the Community did in the above-discussed case.

(c) Thirdly, it is unclear what measures may be taken by a contracting party engaged in protective action. In the GATT it is stipulated that the measures include the suspension of obligations, in whole or in part, and the withdrawal or modification of the concession granted by a contracting party under the GATT⁸⁵. These measures generally include reversing tariff concessions, ie, increasing customs duties and introducing quantitative restrictions⁸⁶. In the EEC-China Trade Agreement, if the Community were to take protective action, it could, for example, reimpose quantitative restrictions, tighten existing quotas or increase customs duty - the general commercial measures available under Article 113 of the EEC Treaty. The safeguard action taken against China in the matter discussed above, by the European Community involved the reintroduction of quantitative restrictions on beach slippers originating in China to be imported into France⁸⁷. As far as China is concerned, the possible measures

available to it include issuing import licences, foreign exchange arrangements and limiting the purchase authority to specific companies or specific products⁸⁸.

(d) Finally, the safeguard clause in the EEC-China Trade Agreement does not mention the legal right of retaliation. In contrast to this, the GATT safeguard clause entitles the affected contracting parties, when a contracting party proposes to take safeguard action, to retaliate, by suspending the equivalent tariff concession or other obligation under the GATT⁸⁹.

In the event of unilateral action pursuant to the safeguard clause in the EEC-China Trade Agreement, should the other party have the right to retaliate? The right to retaliate is not expressly granted by the safeguard clause in the Trade Agreement; nor is it expressly excluded. In the only reported safeguard action taken by the Community, China has not sought to retaliate. In practice, however, the affected party can usually find a way out if it wants to retaliate.

The omission of provisions relating to a right of retaliation again reflects the interests of the European Community because of its great economic strength vis-a-vis China. Such a practice may even be regarded as the Community's tactics. However, China, as the biggest developing country also holds a certain bargaining power. It is not without means of economic retaliation. For example, when the USA unilaterally decided to lower textile quotas to China in 1983 after

the failure of negotiations for a second China-USA textiles agreement, China, in return, shifted its purchase order of US grain to Australia and Canada and the US farmers lost \$500 million of sales⁹⁰.

3. Effectiveness of the Safeguard Clause

In cases where the European Community or a Member State takes unilateral action without pre-consultation, (as happened in the beach slippers case), is it open to an individual (for example, the French importer), to invoke the safeguard clause in defence of such action where there has been no pre-consultation? As the above discussion indicates, the legal nature of the pre-consultation procedure is very vague and the operation of the safeguard clause is highly flexible. It may be concluded from EEC case law that there is little chance of a positive ruling from the European Court of Justice on the legal effect of the pre-consultation requirement (for more discussions see next chapter)⁹¹. Moreover, since there is no specific definition of "where the situation does not admit any delay" in Article 9 of the Trade Agreement, it seems that the contracting party is entitled, in the last resort, to take unilateral measures.

On the other hand, consultation is a necessary part of safeguard action. The parties are required to endeavour, as far as possible, to engage in friendly consultation, even in an exceptional situation where the contracting party is entitled to take unilateral action. In the beach slippers case, for example, the consultation was held late, which resulted in China undertaking to respect the quantitative limits

set by the European Community for imports of the products in question into France within a fixed time⁹².

4. Implications of the Safeguard Clause

The safeguard clause forms an important part of the EEC-China trade mechanism and legal regime at least in theory. However, its practical implications and effect is limited under the current legal regime, because other restrictive measures are available to both parties. This issue may be discussed from two angles.

4.1 First, as far as China is concerned, it may invoke the safeguard clause to protect its domestic industry if necessary. But such an instance is rare, because many other measures are available to China to protect its market. As a developing country, the GATT rules will allow it to protect its infant industries. Also, the GATT permits developing countries to take measures to alleviate their domestic difficulties, and in particular, difficulties in balancing international payments⁹³. Although China was not (and still is not) a member of the GATT, such principles, as general principles, should also be applicable in EEC-China trade. China may invoke these principles to take appropriate measures as it did in 1979 and 1980⁹⁴. Moreover, although the Chinese government may not have the control over foreign trade that it had before the economic reform, it nevertheless still has considerable persuasive power to affect foreign trade. To sum up, China may not need a safeguard clause in trade relations with the European Community as it suggested in the

negotiations. The safeguard clause has therefore little practical importance for China.

4.2 From the European Community's point of view, the safeguard clause is more important than it is to its Chinese counterpart. Because of its enormous economic strength, the Community may utilise it as a weapon to control and regulate trade and economic relations with China. And because of China's export potential, the Community needs the safeguard clause to protect its industry and market if necessary, never mind the underlying political implications for such a clause because of China's socialist system. This explains why the Community insisted on the inclusion of a safeguard clause in the Trade Agreement.

However, further analysis may show that, in reality, the safeguard clause is not as important as it is at first suggested under the current EEC-China trade regime.

Under the Trade Agreement, apart from the safeguard clause, many measures are available to the European Community to control imports from China. These measures include: quantitative restrictions; anti-dumping measures⁹⁵; and the special commercial policy instruments⁹⁶. These measures, together with the safeguard clause and limited MFN treatment, make up the EEC's legal mechanism in trading with China. Where the quantitative restriction system operates in the bilateral trade relations generally and the contracting party can adjust the quotas and introduce or reintroduce quotas whenever

necessary, the importance of the safeguard clause is minimised. This is the position of the Community, which is using the safeguard clause together with the quantitative restrictions measure in administering trade relations with China. In practice, therefore, resort to safeguard action is rare⁹⁷. Generally, adjusting or reimposing quantitative restrictions seems to be a more direct way of achieving the purpose. Indeed, in the only reported case of safeguard action, the Community eventually reimposed quotas to the products in question⁹⁸.

As a supplemental measure, however, the safeguard clause has its own function. Reintroducing a quantitative restriction to a previously liberalised product may involve tough negotiation in the annual Joint Committee meeting. Once quotas have been fixed for a certain period, however, the safeguard action seems a more appropriate way of tackling the problem.

It is submitted that once other measures exercised both by China and the Community have been excluded, for example, no more discriminatory quantitative restrictions, then the safeguard clause shall play a far more important role. A safeguard action, consistent with the GATT rules is more acceptable and a more appropriate measure for the European Community or China to pursue. In this regard, the Trade Agreement will be reviewed to ensure that the discriminatory quantitative restrictions will be revoked; the Chinese government will further dismantle the overall control over foreign trade; and more importantly, the safeguard clause will be redrafted so that it

provides a more clear criterion for enabling the parties to take safeguard action, and a detailed procedure for parties to pursue such action.

Conclusion

1. The safeguard clause applies bilaterally between China and the European Community. It is inconsistent with the GATT safeguard rules and the general principles of the GATT. Such bilaterality is in the Community's interests. The Community, together with the United States, is pressing China to accept a selective safeguard clause in China's negotiations with the GATT to resume its seat in the GATT. Such a clause will minimise the importance of China's joining the GATT, thus it should not be incorporated into the Resumption Protocol.
2. The legal nature and effect of the pre-consultation provisions in the safeguard clause are unclear and the lack of detailed rules as to procedure under the safeguard clause render the pre-consultation requirement of little effect. The European Court of Justice is very likely to give a negative ruling on the legal effect of the pre-consultation requirement.
3. As a last resort the contracting party may take unilateral action to protect the domestic market. There are, however, no clear criteria for the application of the safeguard clause, no provisions relating to specific measures which may be taken and no express right of retaliation. The parties, therefore, have a high degree of discretion

in the taking of safeguard action. This is clearly in the interests of the European Community, as it has more economic strengths vis-a-vis China. With this strong bargaining position the Community would be able to control and regulate trade with China.

4. China may apply the safeguard clause to protect its domestic market and industries, but there are many other methods available to China to protect its market. The safeguard clause is, therefore, more important for the European Community than for China. However, the Community still imposes quantitative restrictions on imports from China. Other protective measures are also available to the Community. Under such a legal regime the importance of the safeguard clause is reduced or even minimised.

5. It is submitted that other trade measures which are discriminatory, should be abolished. Then the safeguard clause will play a more important role. Such safeguard clause should be redrafted to the extent that it gives clear criteria for the application of the clause and more detailed procedures for safeguard action.

D. The Joint Committee

Article 9 of the agreement provides for the setting up of an EEC-China joint committee for trade, comprising representatives of the European Community on the one hand and representatives of China on the other.

The tasks of the joint committee include:-

- (a) monitoring and examining the functioning of the agreement;
- (b) examining any questions that may arise in the implementation of the agreement;
- (c) examining problems that could hinder the development of trade;
- (d) examining the means and possible opportunities for the development of trade; and
- (e) making recommendations⁹⁹.

In the event of obvious imbalance in bilateral trade, the joint committee will study ways of remedying the situation¹⁰⁰. The joint committee also has a duty to keep a close watch on the implementation of the undertaking by China to give favourable consideration to imports from the Community, while the Community is to aim at increasing the liberalisation of imports from China¹⁰¹.

The European Community has established different kinds of joint institutions in agreements concluded with different non-member countries. These agreements may be roughly divided into three, namely, association agreements, free trade agreements and ordinary

trade (and economic co-operation) agreements. The emphases and the functions of the institutions thereby established are different⁹¹.

An institution established under an association agreement plays a more important role than the others. Under the Lomé Convention, for instance, three principal institutions have been established, namely, the ACP-EEC Council of Ministers, the ACP-EEC Committee of Ambassadors and the ACP-EEC Consultative Assembly. The Council of Ministers has responsibility for reviewing the operations and achievements of the Convention arrangements and for taking and implementing broad policy decisions, which are binding upon all member countries on both sides¹⁰². The Committee of Ambassadors is responsible for ensuring the day-to-day operation of the Convention, for generally keeping under review the functioning of the Convention and the development of its objectives and for supervising the work of committees, working groups and other bodies¹⁰³. The Consultative Assembly has the power to establish, on an ad hoc basis, its own contacts "with economic and social circles and is encouraged to submit to the Council of Ministers any conclusion and make any recommendation it considers appropriate"¹⁰⁴. In the third Lomé Convention, a quasi-parliamentary body called the Joint Assembly is substituted for the former Consultative Assembly. Amongst the tasks assigned to this body is that of arranging regular contacts and consultations with representatives of economic and social sectors in the ACP States and in the European Community in order to obtain their views on the attainment of the objectives of the Convention¹⁰⁵.

Clearly, the ACP-EEC economic integration goes much further than the economic relations established under the free trade agreements, or the ordinary trade and economic co-operation agreements. The European Community bears, to a certain extent, the responsibility for improving the economies of its former colonies and territories and for helping their inhabitants to improve their living standards. On the other hand, the Community wants to maintain as great an influence as possible in those countries. These tasks (and others) cannot be handled by a normal joint committee, like the one between China and the Community, but need more substantial institutions. The institutions can in some circumstances make decisions which will bind both the European Community and the ACP countries¹⁰⁶.

With regard to free trade agreements, the institutions established are generally joint committees which are responsible for the administration of the agreements. For this purpose the joint committees have the power to make recommendations and decisions in specific events. These decisions are implemented by the contracting parties in accordance with their own rules. The joint committees also have responsibility, when appropriate, for holding consultations¹⁰⁷. By comparison with the institutions established under the Lomé Conventions, joint committees established under free trade agreements have far less power, although in rare cases the joint committee can make decisions.

As far as ordinary trade agreements are concerned, the joint committees established thereby play rather limited roles. They can

usually make recommendations but cannot make decisions which are binding on the contracting parties¹⁰⁸. The normal functions of this type of joint committee in the Community's trade agreements are more or less the same. These functions are to ensure the proper functioning of the agreement, to devise practical measures for achieving the goals pursued in the agreement, to examine any difficulty likely to hinder the development of trade and economic exchanges and to make recommendations¹⁰⁹. Some of them expressly provide for consultation within the framework of the joint committee, such as the 1976 EEC-Canada commercial and economic co-operation agreement¹¹⁰ and the 1980 EEC-Romania Trade Agreement in industrial products¹¹¹. However, some do not, such as the 1978 EEC-China Trade Agreement.

The EEC-China Joint Committee meetings have been held every year, as planned, to handle matters of implementation of the agreement. In the resolution passed by the European Parliament in 1978 the joint committee was regarded as playing a decisive role in fostering closer relations with China¹¹². This is true because the Agreement itself is only a very general framework; it needs to be implemented. The provisions in the Agreement require the parties to negotiate and consult under the Joint Committee. The quantitative restrictions by the European Community, for example, seems to be decided by the Community unilaterally, but the Chinese parties, through the Joint Committee, have repeatedly required the Community to speed up the revocation of such restrictions. The Joint Committee is therefore to become a forum for negotiation in this regard. Problems arising from

bilateral trade have also been tackled through the joint committee. The joint committee meeting has discussed ways of expanding trade and of curing the imbalance in the bilateral trade¹¹³. Six joint committee meetings were held under the 1978 Agreement. That joint committee was then replaced by the joint committee established under the 1985 Trade and Economic Co-operation Agreement to supervise a wider range of matters, including trade and economic co-operation¹¹⁴.

At the working level the joint committee meets to discuss the practical problems of bilateral trade. Its members are usually officials in the Ministry of Foreign Economic Relations and Trade from China, and officials from the Directorate-General in charge of external relations of the Commission and representatives of the Member States¹¹⁵.

To further the closer economic and political relations it was proposed by the Commission to China in April 1983 that there be regular contact and consultation at high level between the two parties¹¹⁶. The Chinese government accepted this proposal and high level consultation between top officials of the Commission and the leaders of China have been held periodically¹¹⁷. The consultations have covered matters relating to the economy of each party and possible ways of developing relations between the parties and to the world's major political and economic issues¹¹⁸. This consultation arrangement reflects a mutual desire to strengthen and deepen bilateral economic and political relations. It has facilitated a direct channel of communication at a higher level.

E. Other Issues

This Part of the Chapter will discuss certain aspects of the legal regime governing EEC-China trade, such as the price clause, and also certain issues which are not included in the legal regime, but are nevertheless very important to bilateral trade.

1. The Price Clause

The Agreement contains a price clause specifying that "trade in goods and the provision of services between the two Contracting Parties shall be effected at market-related prices and rates."¹¹⁹ It also provides that payment for transactions between the contracting parties shall be made in accordance with their respective existing laws and regulations, in currencies of the Member States of the Community, Renminbi (the Chinese currency) or any convertible currency accepted by the two parties concerned¹²⁰. These two provisions are related to the problems of China's economic system: China is classified as a State-trading country by the European Community. With respect to the latter provision, ie, the currency issue, the Community intends to, through this provision, tackle the problem of the strict foreign exchange control exercised by China. However, the currency of payment for transactions is to be decided by the parties involved in the particular transaction and no party would be willing to accept worthless currency. China's practice with regard to the currency of payment in respect of trade has generally been for settlement in US dollars or the currency of one of the contracting parties, including

the Chinese Renminbi (and its counterpart), depending on what is acceptable to the parties involved. Thus, this provision does no more than express general practice in this area.

With respect to the former provision, ie, the price clause, the problem seems more complex. It is clearly a protective measure designed to prevent the Chinese selling in the Common Market at a low price. Initially the Community proposed a clear legal device that would have had the effect that each party would endeavour to ensure that the prices of its exports were not lower than those prevalent on the market of the other which sounds like fixing a Community price for Chinese products. But since the inclusion of such a provision would have made the Chinese goods non-competitive in the Community, the Chinese negotiating team insisted on scaling down its restrictive scope by proposing a contentious formula for transactions being effected at a "market-related price" instead¹²¹.

"Market related price" is a very vague term. It could mean the market price in the Community or in China. In each party's view, its own market price will be regarded as the "market related price" for imports and exports. In my view, however, it should refer not to prices in the Chinese domestic market, nor in the European market alone, but to prices in the international market because using either party's price may not be fair, particularly in cases of unequal levels of economic development and economic strengths, and different economic systems. However, even the international market price may not be a fair indicator in the current circumstances, because prices in the

international market fluctuate and are difficult to ascertain in practice. Without the clear criterion of international market prices, prices in the European Market, which are more closely related to international market prices, will eventually be referred to. Another vague factor is that the price clause in the agreement requires only a the "market related price", which is not necessarily a price equal to prices prevalent on the international market. In certain cases it could be higher or lower than the price prevalent on the international market, provided that it is not unreasonably far away and is "related". It is difficult to state when the European Community is entitled to claim that import prices have not been set in accordance with this provision. This is a matter to be decided in negotiations.

It is also very interesting to see how such a clause works. Because this provision not only lacks any substance as to what is the "market-related price", it also lacks any practical procedure as to how to decide it, and when it is identified, what follow-up measures should be taken. The textile agreement concluded in the following year had detailed provisions to control the price (see discussion in Chapter VIII), but this was a provision no longer acceptable to the Chinese, who claimed that such a provision was discriminatory. The price provision was revoked in the 1984 textile protocol¹²².

The inclusion of such a price clause derives from the system of price setting in China. Before 1979, for thirty years the Chinese government set product prices at a fixed level. Prices were not decided by market forces but by State plan in order to comply with

orthodox Marxism, maintain the stability of society in general and to make sure that the basic necessities are affordable, and scarce or luxury goods were highly priced. The frozen internal price in China was therefore artificial, and did not reflect the market at all. However, the State monopoly in international trade enabled the government to separate completely the domestic market from the international market. With a massive low paid labour force and its rich natural resources, plus the possibility of government subsidy in one way or another, China is able to produce very low-priced products against which no European products can compete. When the Agreement was negotiated in 1978 the European Community was very concerned about the potential market disruption. At its insistence a price clause was included.

Reactions from the Community and from China towards the price clause in the Agreement are somewhat different. As far as China is concerned, the clause is regarded as a tool utilised by the Community to protect its market against imports from China¹²³, whereas on the Community side, the European Parliament "welcomes the existence of a price clause provided for in Article 7 of the Agreement which will enable the Community, through the Joint Committee, to refuse to admit goods exported at prices fixed, for political reasons, below those obtaining on the market, a practice that causes serious disturbance to the Community market."¹²⁴

The price clause sounds very reasonable. But it has failed to recognise a basic principle in international trade, ie, comparative

advantages. Obviously, both the EEC and China obtain their own comparative advantages. That is what international trade exists for. However, if the party to the transaction cannot sell at its most competitive price, the comparative advantage theory then loses its whole sense. In this regard the price clause in the Trade Agreement functions as a protective tool. By using this tool, the Community may be able to stop the products in question entering into its market through the Joint Committee or even refuse the entry of such products unilaterally. Furthermore, the price clause in the Agreement stands side by side with the Community's anti-dumping rules. On the one hand the Community may use this clause to press China to stop exporting low-priced products, or even refuse the importation of such Chinese goods. On the other hand, it can start anti-dumping proceedings to deal with the low-priced imports from China¹²⁵.

2. Promotion of Contacts and Exchanges

Under the Agreement, both parties undertake to promote visits by persons, groups and delegations from economic, trade and industrial circles, to facilitate industrial and technical exchanges and contacts connected with trade and to foster the organisation of fairs and exhibitions and the relevant provision of services. As far as possible each must grant to the other the necessary facilities for the above activities¹²⁶.

This provision is very special in a trade agreement. Such a provision may not be necessary in trade agreements with other

countries in different situations, for example, between the European Community and India, because there are no political or legal barriers to prevent business, travel or market development between them. It is designed particularly to tackle the practical problems in trade between the European Community and the People's Republic of China.

First of all, the provision encourages authorities on each side to welcome businessmen from the other. Since 1949 China has closed its door to Western countries. Before 1978 it was very difficult for businessmen from the West to travel to and within China. Similarly, for political and other reasons, it was very difficult for Chinese businessmen to come to Europe. Under such circumstances there was little chance of developing trade. It is to the advantage of both sides, therefore, to make the primary conditions for trade favourable.

Secondly, this provision is designed to promote contacts and exchanges in business circles. Because of the lack of contacts and exchanges following the creation of the People's Republic of China, each party is unfamiliar with the other's market. Without close contacts and frequent exchanges, however, it is impossible to develop bilateral trade.

To comply with its international obligations China has gradually created facilities for businessmen from Western Europe and has increased its business contacts and exchanges with the Community¹²⁷. For their part the institutions of the European Community facilitated

trade with China¹²⁸. In particular, the following activities have been undertaken to promote contacts and exchanges with China:-

(i) **Training Scheme:** In order to promote contacts and exchanges the European Community has developed various training schemes for China. It awarded a number of grants at the beginning of 1979, mostly to post-graduate research students, for both short-term and longer-term courses of specialist study at Community universities¹²⁹. The Community also provides training for interpreters, statistical experts and customs officials from China¹³⁰. The largest project for training Chinese personnel is the EEC-China Business Management Centre in Peking. The Commission has allocated ECU3.5m from its programme for non-associated developing countries to this project for the period 1984-1988¹³¹ and has also announced the extension of its financing of the project beyond 1988¹³².

(ii) **EEC-China Business Week:** Under the aegis of the Commission and the Chinese government, the EEC-China business week has been held three times since 1981¹³³. The EEC-China business week brought thousands of executives from Community industrial and banking companies and Chinese decision makers in the economic and trade fields face to face in order to promote direct contact, improve the knowledge of business opportunities in each other's market, overcome obstacles in bilateral trade and eventually promote trade and other economic exchanges¹³⁴. This sort of activity is not prescribed by the Agreement, but it fits into the framework constructed by the Agreement for the promotion of contacts and exchanges. The regular holding of

the business week is a special way to help the development of bilateral trade. It is expected to last for some time.

3. Protection of Intellectual Property

The Agreement is silent on the issue of the protection of intellectual property. As China did not have a patent law until 1985¹³⁵, and still has no copyright law¹³⁶, the protection of intellectual property is a matter of major concern to Western businessmen doing business with China. At the insistence of the US side, the China-USA Trade Agreement in 1979 included a clause for the protection of intellectual property¹³⁷.

However, the concept of using trademarks in China to identify the source of manufacture is by no means new. At the Museum of Chinese History in Beijing today, products with clear trademarks of manufacturers dating back to the Song Dynasty (AD960-1279) can be found on display¹³⁸. It was in 1904 that the government of the "Last Empire" - Qing Dynasty - promulgated China's first trademark law¹³⁹. Shortly after the founding of the People's Republic of China, the PRC's first trademark law was passed in 1950¹⁴⁰, to be replaced in 1963¹⁴¹, and more recently in 1983¹⁴². The trademark law creates the possibility of protecting trademarks in China. China also seeks to protect trademarks in other countries and has negotiated various trademark agreements with Western countries. This provides the basis for mutual protection of trademarks with these countries. Most of the Member States of the European Community (nine out of twelve) have

concluded trademark agreements with China¹⁴³. These agreements generally recognise the rights of nationals of each contracting party to apply for trademark registration in the territory of the other on the basis of reciprocity¹⁴⁴. They also provide reciprocal protection for these trademarks¹⁴⁵.

As far as patent law is concerned, China provided limited protection to Chinese and foreign patents pursuant to the 1950 Provisional Regulations on the Protection of Inventors and Patent Rights, but this law was repealed in 1963 and replaced by the Regulations on Rewards for Inventions passed in the same year¹⁴⁶. This statute has provided hardly any protection to foreign patents. There was thus no satisfactory patent system in China at the time of the negotiation of the EEC-China Trade Agreement, so the subject was not included in the negotiation agenda. However, after more than five years of debate, the modern patent system was eventually established. The Patent Law of the People's Republic of China was adopted on March 12, 1984 and came into effect on April 1, 1985¹⁴⁷. Furthermore, China decided on November 14, 1984 to join the Paris Convention and since March 19, 1985 has been bound by the provisions of that Convention¹⁴⁸. Foreign patent rights are thus now protected.

Copyright law in China has not yet been born but is in the final stage of gestation after a few years of discussion and preparation. A new Chinese copyright law may be expected very soon¹⁴⁹.

From the discussion above, it is clear that the 1978 EEC-China Trade Agreement does not include any provision for the protection of intellectual property. This is not surprising, because at the time the Community started to negotiate the Trade Agreement with China, it was not absolutely sure that the Community would have competence in matters concerning intellectual property. The Community, therefore, did not even include the intellectual property issue in its proposed agreement outline. On the other hand, at that time the issue of protecting intellectual property in China appeared not to be as urgent as it was later. That issue, therefore, was shelved. Such a pragmatic approach may have facilitated the conclusion of the agreement but causes problems in its implementation because it merely avoids the issue rather than resolves it. During the lifetime of the Trade Agreement (1978-1984), the protection of intellectual property was always of concern to the Community businessmen trading with (and investing in) China¹⁵⁰. The problems were alleviated only after the introduction of a patent system in China in 1985.

4. Arbitration

Another omission in the Agreement is that there is no provision for arbitration, unlike the 1979 China-USA Trade Agreement, which incorporates an arbitration clause stipulating that when disputes cannot be settled promptly by friendly consultation, conciliation or other mutually acceptable means, "the parties to the dispute may have recourse to arbitration for settlement in accordance with provisions specified in their contracts or other agreements to submit to

arbitration. Such arbitration may be conducted by an arbitration institution in the People's Republic of China, the United States of America or a third country."¹⁵¹ Furthermore, "the procedure of the relevant arbitration institutions are applicable, and the arbitration rules of the United Nations Commission on International Trade Law recommended by the United Nations, or other international arbitration rules, may also be used where acceptable to the parties to the dispute and to the arbitration institutions."¹⁵² Each contracting party is obliged to seek to ensure that arbitration awards are recognised and enforced by its competent authorities where enforcement is sought, in accordance with applicable laws and regulations¹⁵³. Similar provisions are also included in the trade agreement between China and Japan¹⁵⁴.

It is argued that the arbitration issue is normally decided by the parties concerned in a particular transaction, not by the arbitration clause in the trade agreement between sovereign governments, in the EEC case, by the Community¹⁵⁵. This may be the case for transactions between market economies when the private parties concerned are normally free to choose how to resolve disputes, where any arbitration should take place, the designated institutions, the rules of procedure and the applicable law. But in the case of business activities involving Chinese partners, the Chinese parties were generally loath to settle contractual disputes by arbitration¹⁵⁶. Chinese businessmen and bureaucrats generally preferred to settle disputes through negotiation (friendly consultation) between the parties or, failing resolution by such

means, third-party conciliation, rather than through arbitration or court decisions¹⁵⁷. In a case where an arbitration was inevitable, the Chinese party would insist on domestic arbitration¹⁵⁸.

In facilitating domestic arbitration for international commercial transactions, the Chinese government established, under the aegis of the China Council for the Promotion of International Trade ("CCPIT"), a "non-governmental" organisation that is actually part of the state apparatus and was modelled on the Soviet All-Union Chamber of Commerce, the Foreign Trade Arbitration Commission in 1954¹⁵⁹. In 1958 the government established a Maritime Arbitration Commission under the CCPIT to handle the increasing number of maritime disputes that confronted China¹⁶⁰.

Against this background, the European Community was expected to approach the question of arbitration in its agreement with China as the governments of Japan and the United States did. But the Community regarded this as a matter to be resolved by the private parties in business transactions¹⁶¹. The Agreement therefore did not provide any solution to this issue. Arguably, this is a shortcoming in the legal regime provided by the Trade Agreement as far as the European Community is concerned. However, as the companies from the EC usually have a stronger economic position, these companies are able to get what they want.

The recent development of the Chinese legal system gives an encouraging resolution to this problem. Article 37 of the Law of the

People's Republic of China on Economic Contract Involving Foreign Interests, which came into effect on July 1, 1985, provides, in relation to all contracts between Chinese and foreign economic enterprises and bodies, that if consultation and mediation between the parties are unsuccessful the parties may submit the dispute between them to a Chinese arbitral body or another arbitral body for arbitration, in accordance with the arbitration provision in the contract or a subsequently written arbitration agreement¹⁶².

Footnotes (Chapter III)

1. Gary L Scott, Chinese Treaties, Oceana Publication 1975 p128.
2. Kuang-Sheng Liao, Antiforeignism and Modernisation in China 1860-1980, The Chinese University Press, 1984, Kong Kong.
3. Supra 1.
4. James Chieh Hsiung, Law and Practice in China's Foreign Relations - A Study of Attitude and Practice, Columbia University Press 1972.
5. Article 1, para 2 of the Agreement.
6. Ibid.
7. Para 1, Article 1 of the GATT.
8. K.R. Simonds, The Third Lomé Convention, CML Rev 1985, p395.
9. See "Collection of the Agreement concluded by the European Communities", published by the Office for Official Publication of European Communities.
10. Ibid.
11. The European Community divides its trading partners into five (or more) categories: countries of the European Free Trade Area; Lomé Convention countries; Mediterranean countries; the GATT members and State-trading countries. The advantages accorded to the trading partners are different according to the different categories of the countries in question. The Community's trade policy, therefore, is remarkably discriminatory, yet paradoxically acceptable to the GATT principles.
12. Harish Kapur pp42-48.
13. 13ILM (1974) p872.
14. 18 ILM (1979) p1041
26 Compilation of the Treaties of the People's Republic of China (1979).
15. Article 2 of the China-Japan Trade Agreement (1974).
16. Article 3.
17. Article 4.
18. Para 2, (d), Article 2 of the China-USA Trade Agreement (1979).
19. Para 2, Article 2.

20. Para 5, Article 2.
21. See the 1978 EEC-China Trade Agreement Regulation (EEC) No 1766/82 and No. 3420/83.
22. Article 2, OJ L328/6, 1981 and Article 1, OJ L281/2, 1982.
23. 1980 EEC-Romania Trade Agreement in Industrial Products, OJ L352/5, 1980.
24. Kazimierz Gizybowski ed, East-West Trade Oceana Publication Inc 1972 p13.
25. See discussion in Chapter II.
26. Victor Li, Law and Practices in China's Foreign Trade 1977 p63.
27. For example, India's economic and foreign trade system. See V.S. Mahajan, Planning and Socialistic Transformation of India Economy, New Delhi, 1982.
28. See discussions in Chapter II.
29. Financial Times, 28th December, 1988.
30. 68 League of Nations Treaty Series 321.
31. Agreement between the Government of the United States of America and the Government of the USSR on Supply of Grain, October 20, 1975, 26 US Treaties and other International Agreement 2971, Treaties and other International Act Series No 8206.
32. Agreement on Grain Trade between the Government of the United States of America and the Government of the People's Republic of China, October 22, 1980, Treaties and other International Act Series No 9930.
33. eg, the abortive trade agreement between the USA and USSR on October 18, 1972, 11 ILM 1321 (1972); Agreement on Trade between S.R. of Romania and the USA, April 2, 1975; 26 United States Treaties and other International Agreements 2305; Treaties and other International Act Series No 8159; Agreement on trade relations between the USA and the Hungarian P R, March 17, 1978: 29 United States Treaties and other International Agreements 2711; Treaties and other International Act series No 8967; and Trade Agreement between UK and USSR in 1959 and 1969, GB Treaty Series No 34 (CmnD 1076) and 8 ILM 1301 (1969).
34. Supra 14.
35. 25 Compilations of the Treaties of the PRC (1978).
36. Ibid Vol 19 (1972).

37. Ibid Vol 21 (1974)
This agreement provides that Japan will export technology, plant and construction materials and machinery to China, and China to export crude oil and coal to Japan on an equal and mutually beneficial basis.
38. Supra 13 Article 2.
39. Ibid.
40. See the preamble of the long-term Trade Agreement.
41. J 1978 L306/1. Details of the list of the liberalised goods see annex to Council Reg of Oct 16, 1978 on common rules for imports from the PRC.
42. Supra 18.
43. Article 4 of the Agreement.
44. Ibid.
45. Martin Domka and John N Hazard, State Trading and The Most-Favoured-Nation Clause; 55 AJIL (1958) pp55-68.
46. See Table 2 of Chapter I.
47. See discussion above.
48. Bull. EC 7/8-1979 point 2.2.60, Bull. EC 11-1980 point 2.2.69.
49. Europe Information, External Relations 79/85; The European Community and the People's Republic of China p2.
50. Article 3 of the Agreement.
51. Essays on International Trade. Vol.II p47. 1983 Beijing.
52. Almanac of China's Foreign Economic Relations and Trade 1985, Peking.
53. Ibid.
54. Supra 12.
55. Interviews with officials in the Commission.
56. Supra 50.
57. Europe Information, External Relations: EC and China 79/85 p2.

58. EEC-China Trade 1978-1983 (million ECU)

	1978	1979	1980	1981	1982	1983
Imports	940	1329	1907	2284	2334	2665
Exports	1489	2103	1734	1894	2044	2758
Balance	+ 549	+ 774	- 173	- 390	- 290	+ 90

Source: Eurostat

59. Eurostat.

60. State Statistical Bureau of the PRC, Statistical Yearbook of China - 1987 p592 China Statistics Publishing House, Beijing 1987.

61. Supra 9.

62. Supra 42.

63. Article 1 of the 1979 China-USA Trade Agreement. Supra 10.

64. Bull. EC 3-1988 point 2.2.40.

65. Article 1 of the Trade Agreement.

66. M E J Bronckers, Selective Safeguard Measures in Multilateral Trade Relations.

67. The two negotiating teams were reported to have deliberated over the safeguard clause for a whole night. See Le Monde 5/6 February 1978.

68. Article XIX of the GATT.

69. Supra 12, p41.

70. Ibid.

71. Ibid, p47.

72. Article 5 para 3 of the Agreement.

73. Supra 66.

74. Ibid.

75. Interview with Chinese official in the Ministry of Foreign Economic Relations and Trade who is responsible for negotiation with the GATT working group. See also R E Herzstein, China and the GATT: Legal and Policy Issues Raised by China's Participation in the GATT; 18 Law and Policy in International Business (1986) p371; and C C Li, Resumption of China's GATT Membership, 21 JWTL (1987) p25.

76. Kostecki, East-West Trade and the GATT System. Chapter 1V.
77. See discussions in the next part of this chapter.
78. Article XIX of the GATT.
79. Ibid.
80. OJ No L75/17 1982.
81. Ibid.
82. Ibid.
83. Ibid.
84. OJ No L306/1 1978 Article 11.
85. The GATT, Article XIX Para 1(a).
86. Ibid.
87. Supra 67.
88. Jamie P Horsley, The Regulation of China's Foreign Trade. In M. Moser ed, Foreign Trade, Investment and the Law in the People's Republic of China. pp5-40. Oxford 1987.
89. Article XIX para 3 of the GATT.
90. See Current Conditions in the Textile and Apparel Industries: Hearings Before the Sub-Committee on Trade of the House Comm. on Ways and Means, 99th Cong. 1st Sess 208 (1985).
91. See discussions in Chapter IV.
92. OJ No L244/11 2.9.1983.
93. GATT. Article XII.
94. In 1979 and 1980, when China was facing internal economic difficulties and external balance of payment deficits, it readjusted the economy. As a result, many proposed purchases from Western countries, including Member States of the EEC, were shelved. See China Business Review, March-April, 1979 p69.
95. See discussions in Chapter VII.
96. See the discussion later.
97. As discussed above, only on one occasion, the European Community has applied the safeguard clause to limit the beach slippers imported into France. Supra 67.

98. Ibid.
99. Article 2 of the Agreement.
100. Article 3.
101. Article 4.
102. See K R Simmonds, "The Lomé Convention and the New International Economic Order" 13 CML Rev. (1976) at pp321-323; "The Lomé Convention: Implementation and Regulation" 16 CML Rev (1979) at 428; "The Second Lomé Convention: The Innovative Features" 17 CML Rev (1980) at 417; and "The Third Lomé Convention" 22 CML Rev (1985) at 395.
103. Articles 75-79 Lomé I.
104. Lomé II, Article 175(2) and 175(7).
105. Lomé III, Article 25(2)(b) and K R Simmonds, Supra 102, 22 CML Rev p396.
106. Supra 103, 104.
107. for example, EEC-Portugal 1972 Free Trade Agreement, Article 32; EEC-Spain 1970 Free Trade Agreement, Article 13; and EEC-Austria 1972 Free Trade Agreement, Article 29.
108. for example, EEC-India 19th Trade Agreement, Article 9; EEC-Bangladesh Trade Agreement, Article 10; and EEC-Romania Agreement on Joint Committee, Article 1.
109. for example, EEC-India 1981 Commercial and Economic Cooperation Agreement, Article 10 (OJ No 328/6 1981); EEC-Brazil 1974 Trade Agreement, Article 7 (OJ No 102 1974); and EEC-Pakistan 1986 Commercial, Economic and Development Agreement, Article 7 (OJ No L108/1 1986).
110. Article 4 of the 1976 EEC-Canada Commercial and Economic Cooperation Agreement, OJ No L260/2 1976.
111. Article 2 of the EEC-Romania Agreement on Establishment of Joint Committee, OJ No F352/2 1980.
112. The European Parliament, Resolution on the Trade Agreement between the European Economic Community and the People's Republic of China, OJ No L239/53 9.10.1978 Para 6.

113. See, for example, the third meeting on 12th and 13th November, 1981. The Community expressed the concerns of its deficits. Bull EC 11-1981 Point 2.2.60; and in the first joint committee meeting, the Community part communicated the Community's decision on the generalised preferences, and the Chinese confirmed and explained how it applied the principle laid down in the Agreement of "favourable consideration" for the Community exporters. Bull. EC 7/8-1979, Point 2.2.60.
114. Article 5 of the 1985 EEC-China Trade and Economic Cooperation Agreement, OJ No L250/1 1985; also see discussions in Chapter V.
115. It also holds at Ministerial level.
116. See Bull EC 4-1983 point 2.2.32.
117. See, for example, Bull EC 10-1984 point 2.2.30; and Bull EC 3-1987 point 2.2.24.
118. Ibid. Such consultation, however, has been suspended after June 4th, 1989. The Madrid Summit, 1989 also called for suspension of all ministerial contacts between the Member States and China. See Financial Times, 27th June, 1989.
119. Article 7.
120. Article 8.
121. Supra 8 p48.
122. See discussion in Chapter VIII.
123. Interview with Mr Xiu Shi-Wei, Chinese Commercial Councillor to Brussels, 16th December 1986.
124. Supra 102.
125. See Chapter VII.
126. Article 6.
127. Law on Entry and Exit of Aliens of the PRC promulgated 22nd November, 1985 and came into force on 1st February, 1986.
128. The European Community and the PRC. European Information pp79/85; and Beijing Review, 8th March, 1988 p30.
129. European Information, External Relations 79/54 p4.
130. Ibid.
131. Bull EC 6-1987 point 2.2.2.6.
132. Ibid.

133. Bull EC 4-1981 point 1.3.1; Bull EC 12-1985 point 2.3.33; and Bull EC 3-1987 point 2.2.24.
134. Ibid.
135. On March 12, 1984 the Patent Law of the PRC was passed by the Fourth Standing Committee of the Sixth National People's Congress. It came into effect on April 1, 1985.
136. It is repeatedly reported that the Chinese copyright law is being drafted. It is expected to be promulgated in the near future.
137. Article 6 of the USA-China 1979 Trade Agreement.
138. Han Shaoyou "The Evolution of the Trademark Laws" Jurisprudence (Shanghai) October 1982 p27.
139. J.T. Chang, Trade-Mark Law In China, in M.J. Moser ed. p428.
140. The provisional regulations governing trademark registration. The Governmental Administration Council, April 28, 1950.
141. The Regulations of the PRC governing the control of trademarks. The State Council, April 1963.
142. The Trademark Law of the PRC, passed in August 1982 by the twenty-fourth meeting of the Standing Committee of the Fifth National People's Congress; came into effect on March 1, 1983.
143. The member states which do not have a trademark agreement with China are Ireland, Greece and Portugal. At the time of negotiating the Trade Agreement with China only Ireland has not concluded a trademark agreement with China.
144. For example, Exchange Notes of Preferential Treatment on Trademark Registration between China and Italy in January 1973; 20 Compilation of Treaties of the PRC (1973) Peking.
145. For example, Exchange Notes of Protection of Trademark Registration between China and Spain in June 1977. 24 Compilations of Treaties of the PRC (1977) Peking.
146. Regulation on Rewards for Inventions, 1963 by the State Council.
147. Supra 124.
148. Gazette of Standing Committee of NPC, November 1984, p174.
149. Supra 125.
150. M. Moser ed; Foreign Trade, Investment and the Law in the PRC, (1st) 1984.
151. Article 8(2) of 1979 China-USA Trade Agreement.

152. Ibid.
153. Article 8(3) of 1979 China-USA Trade Agreement.
154. Article 8 of 1974 China-Japan Trade Agreement.
155. Interview with officials of the Commission.
156. See Jerome Alan Cohan, the role of arbitration in economic cooperation with China. In M Moser ed: Foreign Trade, Investment and the Law in the People's Republic of China (2nd) 1987 Oxford pp509-510.
157. Ibid.
158. Ibid.
159. Ibid.
160. Ibid.
161. Interview with officials of the Commission.
162. It was passed by the Standing Committee of the NPC on 21st March, 1985. See Gazette of Standing Committee of the NPC. March 1985, p41.

CHAPTER IV

THE 1978 TRADE AGREEMENT : NATURE AND EFFECT

- A. Nature of the Act
- B. Direct Effect of the Agreement in the EC
- C. The Effect of the Agreement in China
- D. Conclusion

CHAPTER IV

THE 1978 TRADE AGREEMENT : NATURE AND EFFECT

The conclusion of Trade Agreement between China and the European Community represents a great progress for promoting bilateral trade relations. The Agreement addresses major key issues concerning bilateral trade, although some issues are unresolved.¹ This Chapter will analyse the nature of the Agreement, and examine the effect of the Agreement in the European Community and China.

A. Nature of the Agreement

For the purpose of present discussion, the international agreements concerning the European Community, which may bind the Community, could be divided into three categories. Firstly, agreements concluded by all Member States with third countries or international organisations, such as the GATT. The EEC Treaty - and the Euratom Treaty in Article 105 - contain rules applicable to international agreements concluded by Member States with third states before the entry into force of the Treaties. According to the Court of Justice the provisions of such agreements are binding on the Community because the Member States have conferred upon the Community

the powers necessary to meet the obligations contained in the agreements².

Secondly, agreements concluded by the Community. Each of the three Communities has international legal capacity, which finds expression in the conclusion of agreements with third countries or international organisations according to the Treaties. It is now well settled that agreements concluded by the Community form an integral part of Community law³. Under the terms of Article 228 of the EEC Treaty these agreements are binding on the Community; its institutions and the Member States. They are subordinate to the Treaties but take precedence over derivative legislation⁴.

Another category of agreements is mixed agreements. These agreements are concluded by both the Community and its Member States on the one hand, and by a third state on the other. These are agreements which are in a position astride Community and national competence.

Since its creation the European Community, comprising the European Coal and Steel Community ("ECSC"), the European Economic Community ("EEC") and the European Atomic Energy Community or Euratom ("EAEC"), it has become the centre of an international treaty network⁵. Agreements, varied in their legal basis, purpose, form and subject matters, have linked the Community with a multitude of countries and international organisations.

The Community has concluded conventions both with Member States and with third countries to establish diplomatic relations and to obtain privileges and immunities for its institutions and agents⁶. It has entered into bilateral trade agreements with European, North and South American, African and Asian countries, covering a broad range of subject matters, including tariffs and tariff preferences, commodity trade, commercial co-operation, export restrictions, free trade and custom unions⁷. Furthermore, a number of association agreements have created more extensive and stable links between the Community and third countries. Notably, the Lomé Convention associates 67 African, Caribbean and Pacific developing countries ("ACP states") with the Community⁸. In addition to providing for commercial, industrial, agricultural, financial and technical co-operation, the Convention protects the export earnings and the mineral production of the ACP states. Moreover, the Community signed a number of multilateral treaties that emanated from international conferences in which it participated. It thus became a party to several commodity agreements and the GATT agreements⁹. Community agreements are not, however, restricted to commercial matters. The Community is also a party to conventions on the peaceful use of nuclear energy¹⁰, on fishing rights and agricultural matters¹¹, on environmental pollution¹² and on nuclear and health research¹³.

The Trade Agreement of 1978 between China and the EEC, as indicated by the title of it, covers various key issues of commercial policy which fall in with the exclusive competence of the Community.

1) The 1978 EEC-China Trade Agreement differs from association agreements concluded under Article 238 of the Treaty between the Community and third countries¹⁴.

These association agreements represent close ties between the Community and the states concerned. Association under Article 238 is not restricted to European states but is available to any third state or group of states or international organisation. By this means, the provisions of Article 238 constitute an appropriate instrument whereby the Community may establish world-wide co-operation in economic fields and provide closer and more effective ties with other states than the conventional trade treaties provided for in Article 113 of the Treaty. Agreements of association entered into under Article 238 form an integral part of the Community. They are subject to interpretation by the Court of Justice¹⁵. Although Article 238 does not contain any stipulation as to the subject matter of a treaty of association, nor does it define how close the links resulting from association between the Community and a third country may or must be, the absence of specific rules in this area makes it possible to apply Article 238 with great flexibility. For example, the association agreement between the Community and Greece covered matters like free movement of goods, movement of persons and services, matters relating to competition, taxation and approximation of laws and other economic policies. This agreement, with its broad ambit, closed the gap between Greece and the Community and facilitated Greece's accession to the Community, which occurred nearly twenty years after the agreement came into effect¹⁶.

Another example is the association agreement between the Community and Turkey¹⁷. The main objectives of this agreement, as set out in Title I, are the promotion of trade and economic relations between the Community and Turkey, the accelerated development of the Turkish economy and the raising of the employment level and standard of living of the Turkish people through the gradual establishment of a customs union. The agreement includes provision for a transitional stage, the dismantling of customs barriers, free movement and transport, the alignment of economic policies, financial aid in the transitional period. Eventually, when the objectives of the agreement have been attained and Turkey is in a position to take on all a Member State's obligations under the Treaty of Rome, Turkey may be eligible for full membership¹⁸.

The 1978 EEC-China Trade Agreement, with narrow scope and vague terms, is easily distinguishable from these association agreements.

2) The 1978 EEC-China Trade Agreement differs from association agreements concluded between the Community and its "overseas countries and territories"¹⁹.

When the Treaty of Rome entered into force in 1958, certain countries and territories, located primarily in Africa, had a special status of dependency on France, Belgium, the Netherlands and Italy (the United Kingdom was added in 1973). Since there were no trade barriers between these countries and territories and the particular Member States with which they had a special relationship, the

contracting parties to the Treaty had to decide whether these countries and territories should be included in the trade system of the Treaty or whether the close relationship with them should be terminated. They chose the former alternative and established a special system of association.

According to the Treaty and to subsequent agreements, the objectives of these agreements are to facilitate economic and social development and to strengthen the economic structures of the overseas countries and territories, in particular by developing trade, economic relations and industrial co-operation between the Community and these countries and territories, by helping to safeguard their interests (for those economies depend to a large extent on the export of commodities) and by affording financial and technical co-operation.

Apart from the historical connection, the economic benefits for both sides also require them to establish closer relations. From the widely criticised Yaound Conventions and Arusha Agreement to the third Lomé Convention, the Community concluded agreements with these "overseas countries and territories", covering wide areas of economic co-operation. For these associated overseas countries and territories flowed preferential treatment in trade and financial and technical co-operation. For the Community came stabilisation of supplies of raw materials and of the markets²⁰. These agreements are not based on reciprocity, but rather on preferential and differential treatment²¹.

3) The 1978 EEC-China Trade Agreement also differs from the agreements between the Community and the EFTA countries.

The Community's relations with the EFTA countries are governed by strictly bilateral agreements with each individual EFTA member. These agreements have one main feature in common - the principle of free trade in industrial products. As stated in each preamble, each agreement was concluded for the purpose of consolidating and binding existing economic relations between the various partners in an enlarged community and of ensuring the harmonious development of trade under fair conditions of competition. The agreements cover broad objectives such as: increased economic activity, improvement of living and working conditions, expansion of production and promotion of financial stability. The contracting parties thus expressed their desire to contribute to the harmonious development and expansion of trade through the removal of technical barriers to trade²². These agreements fall within the principle of the common commercial policy under Article 113 of the Treaty, which is the principle governing the 1978 EEC-China Trade Agreement. However, the Community's trade agreements with the EFTA countries reflect closer and more consolidated economic and political relations than are reflected in the 1978 EEC-China Trade Agreement. Apart from conforming to the provisions of the GATT, these agreements facilitate closer trade and economic relations than those promoted by the trade promoting agreement of EEC-China in 1978.

Trade agreements between the Community and other developing countries are similar in nature to the 1978 EEC-China Trade Agreement in that they promote trade and economic relations between the contracting parties. However, there are differences. The trade agreements between the Community and Mediterranean countries and some developing Asian countries, are characterised by the preferential treatment accorded by the Community, although the precise terms and conditions vary from agreement to agreement according to the historical relations between the parties. For example, the 1974 EEC-India Commercial Co-operation Agreement²³ provides that, in addition to undertaking to grant to each other most-favoured-nation treatment and the highest degree of liberalisation of imports and exports, the two parties agree on a reciprocal basis to foster co-operation between their economic organisations, especially in the area of export promotion. Furthermore, the Community confirms the suspension of tariffs in relation to the importation of certain products originating in India²⁴. The agreement includes certain GSP commitments by the Community and expresses willingness by the Community to improve the GSP and to examine further tariff adjustments²⁵.

China is a developing country. The 1978 Trade Agreement with the EEC is, however, non-preferential. It is based on a limited most-favoured-nation treatment in matters regarding, inter alia, customs duty and taxes²⁶. It includes a number of reciprocal rules aimed at promoting trade. Reciprocal rules of a comparable nature are to be found in the 1976 EC-Canada Commercial and Economic Cooperation

Agreements²⁷ although these deal more comprehensively with economic co-operation. The EC-Canada trade policy is governed by the rules and dealings of the GATT²⁸, since both sides have developed economies. China, however, is a developing socialist country and not yet a member of the GATT.

Over a very considerable period, the Community has not had official dealings with the USSR and its allies or with the People's Republic of China. Although the Community concluded a trade agreement with Yugoslavia in 1973²⁹, the 1978 EEC-China Trade Agreement is the first trade agreement so far between the Community and a socialist country which is not a member of the GATT. It has special significance because the agreement was concluded after the Community's proposal to enter into new agreements with the State-trading countries which was rejected by all of them except China³⁰. The Community informed these countries that it was ready to negotiate new trade agreements to replace the agreements between the countries in question and individual Community Member States. These were due to lapse in 1974. The proposal was rejected by the CMEA countries at first, which required the Community to negotiate an agreement with CMEA instead. However, some special arrangements between CMEA countries and the Community, mostly agreements in the agricultural, steel and textile products sectors, do exist³¹.

In June 1988, a Joint Declaration on establishment of official relations between the CMEA and the EC was signed; the relations between them are thus normalised. At the same time, most Eastern

European countries, including the USSR, decided to accredit diplomatic missions to the Community, Trade and commercial and economic cooperation agreements between the EC and the countries concerned either are under negotiation or have been concluded³².

It may be concluded from this discussion that the 1978 EEC-China Trade Agreement is an agreement falling within Article 113 of the Treaty, concluded between the Community and a country which is classified as a State-trading country on the basis of non-preference.

B. Direct Effect of the Agreement in the EC

According to international law, the effect of an international agreement between sovereign states is determined by the national laws concerned³³. Thus no rule of international law is violated by a national constitution which prohibits a national judge from recognising the legal effect of any purported rule other than rules laid down by his own national legislator so long as the international agreement concluded by the country concerned is duly adopted and properly implemented. Otherwise, the state in question may have to bear the responsibility for breaching the international agreement. It is, therefore, understandable that the doctrine of direct effectiveness of international treaties has received little attention in international legal circles³⁴.

However, as questions relating to the nature of the European Community legal order began to emerge, the issue of the direct effectiveness of a Community rule faced the European Court of Justice as early as 1962³⁵. In its landmark decision of Van Gend Loos, the Court introduced the notion of direct effectiveness of Community rules, which is further developed its well-established case law³⁶.

The issue to be discussed now is the possible direct effectiveness of the provisions of the 1978 EEC-China Trade Agreement in the European Community. This issue is related to the question of the direct effect of an agreement concluded by the Community with a third state or international organisation. Starting with the International Fruit Company case³⁷, the Court has made various rulings which may indicate some jurisprudential orientation in this field. The case law in this area is nevertheless far from being well settled. The agreements involving these rulings can be divided into four different categories for the purpose of the present analysis, namely, association agreements between the Community and third states, which include the association agreements under Part IV of the Treaty and Article 238 of the Treaty respectively; free trade agreements concluded by the Community with third states; the multilateral trade convention to which the Community was not a party, but it subsequently became bound by the GATT; and normal trade agreements between the Community and third states³⁸.

1. Summary of Case Law

The first case on international agreements was International Fruit Company³⁹. This dealt with three main points. First, it concerned the validity of Community regulations challenged before national courts as infringing Article XI of the GATT. Secondly, it was held that an individual might contest the validity of the regulation only if the GATT provision invoked is capable of creating rights of which interested parties may avail themselves in a court of law; thirdly, the Court examined the spirit, general scheme and terms of the GATT, an approach it which has largely followed since⁴⁰. The Court examined the GATT in a rather cursory manner⁴¹. It referred to the "great flexibility" of its provisions and to the possibility of derogation and stressed in particular that contracting parties may settle their differences by consultation and by negotiation, and, if these fail, may proceed, even without prior consultation, in urgent cases to unilateral action. In the Court's opinion "those factors are sufficient to show that, when examined in such a context, Article XI of the General Agreement is not capable of conferring on citizens of the Community rights which they can invoke before the courts."⁴² Thus the Court denied that a GATT provision had a direct effect solely because of the nature, objectives and structure of the General Agreement. The Court did not, therefore, consider it necessary to examine the question of whether the provisions concerned would have complied with the standard requirements for direct effectiveness of a Community rule⁴³.

The rulings in that case were not strictly followed by the later cases. In Schroeder⁴⁴, the Court reviewed the validity of a Commission regulation allegedly infringing Article 41 of the Association Agreement with Greece without having examined whether this provision conferred rights on individuals; In Nederlandse Spoorwegen⁴⁵, the Court again reviewed a Community rule in the light of Article II of the GATT without examining whether this provision created a right which an individual might invoke.

In Bresciani⁴⁶, the Court made rulings on the interpretation of the Yaounde Convention of 1963 concluded between the Community and its Member States, on the one hand, and certain African states ("associated states") on the other. The case dealt with a conflict between Article 2 para 1 of this Convention, which prohibits the EC Member States from imposing customs duties (or equivalent charges) on imports from any of the associated states and a national law of one of the EC Member States.

This ruling, which for the first time recognised the direct effect in EC law of a provision of an agreement, is of particular importance to the subsequent jurisprudential development of this subject.

In considering whether the provision in question could confer a right on individuals, the Court referred to the spirit, the general scheme and the working of the Convention. The Court emphasised the special nature of the Convention. It referred, in particular, to

Article 131 of the EEC Treaty under which certain overseas countries, which had special relations with some of the Member States, were to be associated with the Community. Referring to "the special economic and political connections" of those countries with the Community, the Court recalled the special objectives of such an association. The Court examined briefly the functions of the Association Council regarding the conditions for applying Article 2 of the Convention and underlined the fact that only an associated state might request a consultation with this body.

Having examined general characteristics, such as the legal nature and objectives of the Convention and its institutional structure, the Court then considered the meaning and scope of the Community obligation under Article 2 para 1 of the Convention. The Community obligation to abolish charges having an effect equivalent to customs duties is, according to the Court, identical to the obligation which the Member States assumed towards each other under Article 13 of the EEC Treaty. The Court said that "by expressly referring, in Article 2(1) of the Convention, the Community undertook precisely the same obligations towards the associated states to abolish charges having equivalent effect as, in the Treaty, the Member States assumed towards each other".⁴⁷ Applying the standard requirements for direct effect of a Community rule, the Court stated that "this obligation is specific and not subject to any implied or express reservation on the part of the Community" and therefore "capable of conferring on those subject to Community law the right to rely on it before the courts".⁴⁸

The Pabst case⁴⁹ deals with the Association Agreement with Greece, concluded by the Community and the Member States jointly. It concerns the direct effect of Article 53 of the Association Agreement, a provision which is similar to Article 95 of the EEC Treaty. According to the Court, Article 53 of the Association Agreement performs the same functions as Article 95 of the EEC Treaty, and is therefore directly effective. The Court arrived at this conclusion on two grounds: the objectives and the nature of the Agreement and the nature and purpose of the provision concerned, which met the standard requirements for direct effect of a Community rule. The Court examined the provision of the Agreement in the light of the objectives. It viewed this provision, intended to ensure an equal fiscal treatment of products imported from Greece, as being one of the measures aimed at preparing and facilitating the incorporation of Greece within the Community. It is clear therefore that the Court considers the Association Agreement as already being a preliminary, preparatory stage for the ultimate incorporation of Greece within the Community. The Court also recognised that the provision imposed a clear unconditional obligation, the application or effect of which required no further action.

Another type of agreement on which the Court has ruled is the free trade agreement. In view of the fact that association agreements reflect special relations between the Community and the countries concerned, the rulings on the free trade agreement may be more important to the question to be discussed later, as the 1978 EEC-China Trade Agreement has more in common with these free trade agreements

than with the association agreements concluded between the Community and other countries.

The Polydor case⁵⁰ concerned the issue of the protection of industrial and commercial property rights under Articles 14 and 23 of the free Trade Agreement concluded by the Community with Portugal which are similar to Articles 30 and 36 of the EEC Treaty. In this case, two fundamental issues were raised before the Court. First, could Articles 14 and 23 be interpreted in the same manner as the Court interpreted Articles 30 and 36 of the EEC Treaty? Secondly, even if the case law of the Court could not be prayed in aid, could the relevant provisions of the agreement nevertheless have direct effect?

Again, the Court based its reasoning on two considerations: the nature and overall objectives of the agreement, and the specific purpose which these provisions are to pursue. The Court first characterised the nature of the agreement and underlined the fundamental differences between that agreement and the EEC Treaty. It then referred to the more modest objectives of the free trade agreement, namely the mere liberalisation of trade between the Community and Portugal. In the Court's view, the agreement sought to eliminate customs duties and equivalent charges and quantitative restrictions and equivalent measures. The Court also briefly mentioned the function of the joint committee under which the agreement was to operate.

The second consideration concerned the nature of the provisions of Articles 14 and 23 of the agreement on the elimination of trade restrictions between the Community and Portugal which, the Court recognised, were "expressed in terms... in several respects similar to those of the EEC Treaty on the abolition of restrictions on intra-Community trade."⁵¹ The Court refused, however, to conclude from this that the provisions of the agreement had the same meaning as the comparable Treaty provisions. It emphasised that these provisions must be understood within their proper context and framework and in the light of their specific purpose. According to the Court, "such a similarity of term is not sufficient reason for transposing to the provisions of the agreement the above mentioned case law, which determines in the context of the Community the relationship between the protection of industrial and commercial property rights and the rules on the free movement of goods."⁵² The case law evolved against the background of an intention to promote the creation and development of a common market. "The scope of that case law must indeed be determined in the light of the Community's objectives and activities as defined by Articles 2 and 3 of the EEC Treaty."⁵³ According to the Court, such considerations do not, however, apply to the free trade agreement with Portugal simply because it does not seek to promote and establish a common market. Consequently, the Court considered that the provision of the agreement seeking to eliminate quantitative restrictions and equivalent measures did not have "the same purpose as [the equivalent provision of] the EEC Treaty."⁵⁴ Similarly, the extensive interpretation of the measures restricting of the protection of industrial and commercial property rights is also to

be seen in the light of the function of these rights in promoting or binding the development of a common market. The protection of these rights within the framework of a free trade agreement performs a different function. Accordingly, the same industrial or commercial property right enjoyed under a national law of a Member State may be treated differently depending on whether it is exercised in intra-Community trade or in a trade relation with a third state which has concluded a trade agreement with the Community. The Court further justified this differentiation by reference to the institutional structure of the Community.

For all these reasons the Court concluded that the prohibition against the importation of a product from Portugal, based on the exercise of copyright, was justified on the basis of Article 23 of the agreement and did not therefore constitute a measure having an effect equivalent to a quantitative restriction prohibited by Article 14 of the Agreement. Since Article 14 of the Agreement was not applicable in this case, the Court left the important question as to the direct effect of this provision unanswered.

The very important case, Kupferberg⁵⁵, also related to the free trade agreement between the Community and Portugal. It concerned the rate of monopoly equalisation duty imposed on imports of Port wine from Portugal, which allegedly infringed Article 21 para 1 of the agreement, which prohibited fiscal discrimination of imported products. Questions raised were whether this provision had direct

effect and, if so, whether it had the same meaning as Article 95 para 1 of the EEC Treaty.

Because of the fundamental importance of the questions raised, several Member States participated in the preliminary procedure. In their view, the standard requirements for direct effect of a Community rule were not applicable to free trade agreement concluded by the Community with third states. They based their view on the following grounds: the divided competence of the Community in the field of external relations; the principle of reciprocity; the mechanism for settling differences between the contracting parties; and the safety clauses permitting derogations from the agreement⁵⁶.

The Court dismissed these arguments, and made several noteworthy statements. As to the principle of reciprocity, the Court considered that the refusal by a national court to recognise the direct effect of an agreement did not per se constitute an infringement of reciprocity in the implementation of the agreement⁵⁷. Contracting parties to an international agreement are free to determine their own legal procedure for the pursuit of the agreed objectives. The Court examined the mechanics for the settlement of disputes and said: "the mere fact that the contracting parties have established a special institutional framework for consultations and negotiation inter se in relation to the implementation of the agreement is not in itself sufficient to exclude all judicial application of that agreement" if an unconditional and clear obligation is provided.⁵⁸ The Court considered that the safety clauses permitting a derogation from the

agreement were not, in this instance, sufficient in themselves to affect the direct applicability⁵⁹. The Court confirmed that "neither the nature nor the structure of the agreement concluded with Portugal may prevent a trade from relying on the provisions of the said agreement before a court in the Community."⁶⁰ Nevertheless, to have direct effect, a provision must be unconditional and sufficiently clear. Whether it meets those requirements or not is to be judged within the framework of the agreement and in the light of its meaning and purpose⁶¹. According to the Court, in this case, the liberalisation of trade, by the elimination of customs duties and equivalent charges and the abolition of quantitative restrictions and equivalent measures, could still be frustrated by discriminatory fiscal measures and practices⁶². For this reason, the prohibition of such practices was an indispensable complement to the traditional means of liberating trade. Thus "the first paragraph of Article 21 of the Agreement imposes on the Contracting Parties an unconditional rule against discrimination in matters of taxation, which is dependent only on a finding that the products affected by a particular system of taxation are of like nature."⁶³ The Court concluded that the provision might therefore be applied by a national court and have direct effect throughout the Community.

This case has some points worthy of note. First, by contrast with the above, Kupferberg seems to indicate that the legal nature of an agreement is irrelevant to its effect. In Bresciani, the Court based its decision as to the direct effect of the Convention, *inter alia*, on the ground of the special link between the African states and

the Community, a link already provided for by the Treaty⁶⁴. In Pabst, one of the considerations taken into account on the question of the direct effectiveness of a provision of the Association Agreement prohibiting fiscal discrimination was that this provision had to prepare for and facilitate the incorporation of Greece within the Community⁶⁵. However, in the Kupferberg case, which dealt simply with a free trade agreement, the Court went further. In this case the agreement neither established a special link with the Community, as in Bresciani, nor did it prepare for future membership of a country within the Community, as in Pabst. Kupferberg suggests that neither the legal nature of an agreement nor the intensity of its link with the Community is relevant to the direct effectiveness of an agreement.

Another point is that the unconditional nature of an obligation, one of the essential requirements for direct effect, is closely related to the conditions under which safeguarding measures derogating from an obligation may be taken by a contracting party. Clearly, if a contracting party may, according to the safety clauses, take such measures unilaterally, the unconditional nature of an obligation may be in question. In Kupferberg, the Court placed great emphasis on the specific conditions under which such measures might be taken under the agreement. These involved a joint examination of the intended measures by the contracting parties within the joint committee.

In a most recent and probably most important case, Bulk Oil, a fundamental issue arose as to whether the 1975 EEC-Israel Trade Agreement shall have a direct effect. The Court was asked whether

this agreement has prohibited a Member State from implementing a policy imposing new quantitative restrictions or measures having an equivalent effect on export to Israel⁶⁶ and whether the relevant provisions of the agreement have a direct effect so as to enable an individual to rely on them before a Court.⁶⁷

The Court first noted the objective of the EEC-Israel Trade Agreement as being the progressive abolition of the main obstacles to trade between the parties and the promotion of commercial reciprocity.⁶⁸ It then examined the specific obligations concluded in the relevant provisions. Article 3 of the agreement expressly prohibited any new quantitative restrictions on imports or measures having an equivalent effect. With regard to exports, on the other hand, Article 4 simply prohibited the introduction of new customs duties or changes having an equivalent effect. Neither that Article nor any other provisions of the EEC-Israel Trade Agreement expressly prohibited quantitative restrictions on exports or measures having an equivalent effect on trade between the Community and Israel.⁶⁹ The Court then concluded that the EEC-Israel agreement in 1975 did not prohibit the imposition of new quantitative restrictions or measures having an equivalent effect on export from a Member State to Israel. Because of such a conclusion, the Court ruled that there was no need to reply to the question of the direct effect of the agreement.⁷⁰

The importance of this ruling shall by no means be ignored. In this case, the Court did not mention the nature of the agreement, nor did it mention the relations between the Community and Israel as it

did in Bresciani. The Court simply referred to the provisions of the EEC-Israel agreement in coming to the conclusion that the agreement itself did not prevent either party imposing quantitative restrictions on export.⁷¹ This case is important because first, the EEC-Israel agreement is an ordinary trade agreement. It is neither an association agreement nor even a free trade agreement. Secondly, the relationship between the EEC and Israel is that they are normal trading partners. They are neither former colonials of having special relations between Member State(s) and Israel; nor preparing for Israel's future membership of the EEC. What the Court had done was to find out whether the relevant provisions in the agreement had created clear and unconditional right or obligation to the party in question.

2. Some conclusions

The case law on this subject is far from sufficient to enable a definite conclusion to be drawn. However, some points are nevertheless clear.

First, the legal nature or basis of an agreement is not the decisive factor in the consideration of direct effect. Thus, the Court has recognised the direct effect of an association agreement and a free trade agreement as well as an ordinary trade agreement, as illustrated by the Bresciani, Pabst, and Kupferberg cases. In this regard, it is a pity that the Court did not give a clear ruling in the Buil Oil case because this case involves an ordinary trade agreement. As to the nature and intensity of the link between an agreement and the Community legal order which is a pre-requisite to a finding of

direct effectiveness, the case law of the Court is undecided. In Bresciani the Court stressed the special and close link between the Yaounde Convention and the Community legal order and its objectives, as it did in Pabst with respect to the association agreement with Greece. In both cases this special relationship constituted one of the grounds of the Court's decision. In Kupferberg on the other hand, the Court ignored the weaker and looser relationship between the free trade agreement and the ordinary trade agreement and the Community legal order than was apparent in relation to any of the above-mentioned association agreements.

Secondly, the Court has always attached great importance to the overall objectives of an agreement and to the specific purpose of a particular provision. In Polydor, having compared the modest objectives of a free trade agreement with the ambitious objectives of the EEC Treaty, the Court ruled that the provisions of such an agreement must be understood in their proper context. A similarity of terms is not sufficient to justify the interpretation of provisions of an agreement by reference to case law on similar provisions in the EEC Treaty. According to the Court, because of different objectives, a provision of a Community agreement whose wording is similar to or even identical with a Treaty provision may not have the same meaning as the Treaty provision.

Thirdly, the Court's attitude towards the institutional structure created by various agreements has been inconsistent. In International Fruit Company, the lack of jurisdiction for settling disputes between

the parties was one of the grounds for denying direct effect to the GATT provisions. In Pabst, on the other hand, the Court did not refer to the Arbitration Court of Association established under the association agreement with Greece. In fact, in that case the Court was not concerned with the institutional structure of the association agreement. In Polydor the Court referred to the different institutional structure of the Community to justify the narrow interpretation of the provision concerned. In Kupferberg, however, the Court did not mention this lack of jurisdiction although dealing with the same agreement. In Bulk Oil, the Court did not mention the institutional structure neither.

Fourthly, one of the essential prerequisites for a finding of direct effect of a provision is the unconditional nature of an obligation created by the provision, as the Court ruled in Pabst, Bulk Oil and Kupferberg. In Kupferberg the Court ruled that a safety clause under the agreement, permitting a derogation from the particular obligation, did not preclude direct effectiveness, since a derogation is permissible only subject to specific conditions, for example, following a consultation between the contracting parties within a joint committee.

Finally, as regards the principle of reciprocity, the Court took no explicit stand on the requirement for reciprocity. In Haegemann the Court took the first step by stressing that an imbalance of obligations assumed by the contracting parties did not necessarily preclude the direct effect of the association agreement in question.

In Kupferberg the Court's ruling was quite clear. In its view the failure of one of the contracting parties to ensure that an agreement had a direct effect in its jurisdiction did not, according to general principles of international law, infringe the reciprocity required for a full and faithful performance of the agreement, as in practice national courts do not take into consideration the principle of reciprocity when considering the effect of international agreements within their legal systems. The Court thus rejected one of the main objections to the direct effect of an agreement concluded by the Community.

3. Analysis of EEC-China Agreement

The issue of the direct effect of the 1978 EEC-China Trade Agreement may now be examined in the light of this jurisprudence.

First, although the rulings in Bresciani, Pabst, and Kupferberg make it clear that the legal nature of an agreement or its legal basis is irrelevant to the Court's decision on the direct effect of the agreement, it is too early to conclude that the legal nature or legal basis of the 1978 Trade Agreement between China and the Community creates no obstacles to the direct effect of its provisions. In Kupferberg, the Court held that the relevant provision of the EEC-Portugal Free Trade Agreement had direct effect without mentioning the legal nature and legal basis of the agreement. In Bulk Oil the Court also did not mention the nature and legal basis of the agreement. However, in Bresciani the Court stressed the special

relationship between the Community and the African states and Madagascar. And in Pabst the Court emphasised the purpose of the association agreement, which was to prepare for and facilitate the assimilation of Greece to the Community.

Even if Kupferberg is to be taken into account, it should be borne in mind that political and economic relations between the Community, Portugal and Israel are closer than those between the Community and China. Because of the close political and economic relations, Portugal subsequently became a member of the Community. Furthermore, as China is classified as a non-market economy, the Trade Agreement concluded with the Community is based on the Community's trade agreement proposal with State-trading countries. The legal nature of this is different both from that of free trade agreements and from that of the ordinary trade agreement.

Although the case law tends to favour the direct effect of the agreement concluded by the Community with non-member states, how far the Court can, and will, go in this direction is not clear⁷². Particularly in view of the weaker and looser relations between the Community and China, the direct effect of the 1978 EEC-China Trade Agreement seems in doubt.

Secondly, linked with the first point, the legal nature of the 1978 EEC-China Trade Agreement is reflected by its limited objectives. Compared with the wide objectives of Yaounde Convention II⁷³, and the association agreement with Greece⁷⁴, the objectives of the EEC-China

Trade Agreement are limited and its scope is narrow. The first paragraph of the Agreement describes the objectives of the agreement as the development of economic relations and trade and the giving of a new impetus to these relations⁷⁵. Consistent with these limited objectives are the main heads of agreement, such as mutual MFN treatment, balanced trade, friendly consultations, favourable consideration for imports from the Community and increasing liberalisation of imports from China, promotion of technical exchanges and personnel contacts. The limited scope of the 1978 EEC-China Trade Agreement is further illustrated by comparison with the free trade agreement between the Community and Portugal, which aims to consolidate and to extend, upon the enlargement of the European Community, the economic relations existing between the parties and the harmonious development of their commerce in order to contribute to the construction of Europe⁷⁶. In order to achieve this end, the agreement provides for the progressive elimination of the obstacles to free trade, in line with the GATT provisions concerning the establishment of a free trade area⁷⁷, whereas the EEC-China Trade Agreement aims merely to promote trade and economic relations.

In Bulk Oil, the EEC-Israel agreement has a modest object in comparison with association agreements and even free trade agreements. However, its objects are very clear, definite and concrete, ie to progressively abolish the main obstacles to trade between the parties.

Thirdly, it is apparent from the above discussion that the nature and the purpose of the provision in question and whether it imposes a

clear, unconditional obligation also play a crucial role in the Court's determination of its direct effect. The 1978 EEC-China Trade Agreement, which contains 11 Articles, concerns general matters relating to bilateral trade. The MFN treatment accorded by Article 2 provides the main legal basis for bilateral trade. The terms of this Article aim to promote the trade and the obligation imposed by this provision is clear. Its application and effect require no further acts. However, whether the Court will recognise the direct effect of such a provision is doubtful, especially in view of the nature, structure and general objectives of the Agreement.

In Article 4 of the Agreement the Chinese side promises to give favourable consideration to imports from the European Community. The Community exporters will have every opportunity to participate in trade with China. In return the Community will "strive for an increasing liberalisation of imports" from China, it will endeavour to extend the list of products for which imports from China have been liberalised and to increase the amount of quotas. Like other provisions in the Agreement, this is a general guideline and statement of intent. The application of this sort of provision needs further actions. Such a provision in the Agreement has less possibility of being recognised to have direct effect by the Court. Either there is no clear, unconditional obligation, or the provision concerns the governmental arrangement only.

As far as reciprocity is concerned, the Chinese legal system adopts a different approach towards the direct effect of international

agreements. Since the Court has ruled that a failure of one of the contracting parties to recognise the direct effect of an agreement does not infringe the principle reciprocity so long as a full and faithful performance of the agreement is provided for⁷⁸, an application of how the agreement is implemented within the Chinese legal system is not relevant to a consideration of the direct effect of the agreement in the Community.

Finally, the institutional aspect and the safeguard clause are also worthy of note. As mentioned above, the institutional aspect is not conclusive for the Court has shown different attitudes in various cases. The EEC-China Trade Agreement provides for the establishment of a joint committee to be responsible for the administration implementation of the agreement. However, the function of the joint committee is completely different from that of the Community institutions, and also of institutions established under association agreements. Thus, the lack of the jurisdiction for settling disputes between the Community and China arising out of the application of the Trade Agreement, and even the lack of jurisdiction to ensure a uniform interpretation of the Agreement by the contracting parties, may give grounds to the Court to reject the direct effect of the Agreement, as it did in International Fruit Company and implied in Polydor.

As far as the safeguard clause is concerned, the EEC-China Trade Agreement calls for friendly consultation before any protective measure is taken. However, Article 5(2) provides that in the urgent situation unilateral action may be taken. The consultation obligation

imposed in the Agreement is thus likely to be avoided if one of the contracting parties alleges that the situation justifies it. Under these circumstances it is very unlikely that the Court will grant a direct effect to the provisions of the Agreement.

C. The Effect of the Agreement in China

Many writers have discussed the treaty law of the People's Republic of China⁷⁹. However, little research has been done on the relationship between Chinese municipal law and international treaties to which China is a party, and on the possible direct effect of an international treaty within the Chinese domestic legal system. This part of the Chapter will analyse the nature and the role of international treaties in the People's Republic of China, examine the circumstances in which a trade agreement may have direct effect in China and consider whether the 1978 EEC-China Trade Agreement may have direct effect.

1. The PRC Treaty Making Process

China considers that treaties are the principal source of international law⁸⁰. In practice China regards a treaty as the principal instrument according its international rights and obligations⁸¹. The treaty-making process followed by China does not differ substantially from the procedure general accepted by other states.

Power of negotiation

Under the 1954 PRC Constitution the plenipotentiary to negotiation was to be appointed by the head of state, ie, the Chairman of the PRC, in accordance with the decision of the Standing Committee of the National People's Congress ("NPC") (the Chinese parliament equivalent⁸²). In practice, the plenipotentiary could be the Premier, the Foreign Minister, other persons and even the Chairman himself⁸³. However, under the 1982 PRC Constitution, although the Standing Committee of the NPC still exercises the functions of appointing the plenipotentiary, the negotiation of treaties and agreements is clearly the responsibility of the State Council (the PRC executive of the Government)⁸⁴. Article 89(9) of the 1982 Constitution authorises the State Council to "conduct foreign affairs and conclude treaties and agreements with foreign states."⁸⁵

It is China's practice to delegate full power to its representatives when it is to negotiate a formal treaty⁸⁶. This authority is usually referred to in the preamble to the treaty⁸⁷. However, when the head of state negotiated a treaty himself in the 1950s and 1960s, full power was not required⁸⁸. In the 1970s and 1980s no treaty or agreement has been negotiated by the head of state himself.

Signature

The common practice of most countries in the treaty making process is that, when negotiations have been concluded and the treaty is embodied in proper form, the plenipotentiaries sign the treaty⁸⁹. China follows this practice. However, China regards the signature as having three different functions:-

- (i) to give the treaty effect in the case of treaties which do not require ratification⁹⁰;
- (ii) to ensure the authentication of the text or treaty; and
- (iii) where appropriate, to make the treaty ready for ratification⁹¹.

Sometimes the negotiating representative merely signs a treaty ad referendum or by initialling. This is consistent with international practice. As to the effect of this act, Judge Fitzmaurice holds that initialling or signing ad referendum by a representative does not bind his government⁹². Chinese state practice and PRC writers seem to take a similar position⁹³. This particular point was made very strongly by the PRC in relation to the Sino-Indian border dispute over the validity of the McMahon Line. The PRC claims that the draft treaty of the 1914 Simla is not binding on China since the Chinese representative only initialled his name⁹⁴.

Ratification

Ratification is the final confirmation given by the parties to an international treaty concluded by their representatives. Question as to which organ is competent to ratify a treaty depends upon the municipal law of the states concerned. In China's case this function is exercised jointly by the Standing Committee of the NPC and the Chairman (President after 1982) of the state⁹⁵.

There is no general rule of international law prescribing what kinds of treaty require ratification. This question, too, is determined by the municipal law of the parties and by the provisions of the treaty itself. Chinese law has made it clear however. The Standing Committee of the NPC has decided by resolution that treaties which require the ratification of the Standing Committee are treaties of peace, mutual non-aggression, friendship, alliance and assistance, and all other treaties which expressly require ratification. All other agreements may be approved by the State Council⁹⁶.

The conclusion of the 1978 EEC-China Trade Agreement

When the two parties decided to negotiate an appropriate trade agreement in May 1975 during the visit made by Sir Christopher Soames (then Vice President of the Commission) to Peking⁹⁷, China was still undergoing the "cultural revolution"⁹⁸. There was, de facto, no head of the State at that time⁹⁹, and later, by virtue of the amended constitution in 1975, there was, de jure, no head of the State.¹⁰⁰

Some of the functions exercised by the Chairman of the State under the 1954 PRC Constitution were channelled to the Chairman of the Standing Committee of the NPC¹⁰¹.

During this period the negotiations for trade agreements with other countries were conducted by the State Council. In the case of the 1978 EEC-China Trade Agreement, the Ministry of Foreign Trade was authorised to negotiate it¹⁰². The Minister of Foreign Trade, Mr Li Qiang, signed the agreement¹⁰³ and the Agreement was finally approved by the State Council¹⁰⁴.

2. International Treaty and the Municipal Law: PRC's Attitudes and Practices

There is no specific provision in the PRC Constitution regarding the status of an international treaty to which China is a party, within the Chinese domestic legal system. However, one prominent Chinese writer once wrote that, in order for an obligation under an international treaty to have effect within a state, the state must take legislative measures to implement the treaty¹⁰⁵. How to implement the treaty is a matter of municipal law and different countries may have different systems. A state may adopt special legislative measures every time that it concludes a treaty; or it may have a general rule that, once a treaty is entered into, it has automatic effect in the domestic legal system; or it may, by virtue of custom, implicitly accept the binding force of the treaty in its domestic legal system¹⁰⁶. The view expressed by this author does not

diverge widely from such Western writers as Lauterpacht-Oppenheim, Verdross, McNair and O'Connell¹⁰⁷.

China's state practice with regard to the relationship between international treaties and municipal law exhibits similarities to practice in Western countries. In China, when a treaty is ratified or approved, it comes into force in accordance with its provisions; or if a treaty does not need ratification or approval according to its provisions, it comes into force upon the signature or on a date specified by the treaty. There is no other legislative action needed to implement the treaty in the Chinese domestic legal system unless the treaty so requires.

The treaty will be published in Chinese official publications. A treaty ratified by the Standing Committee of the NPC will be published in the Gazette of the Standing Committee. All treaties, including agreements which do not need ratification by the Standing Committee, but only need approval by the State Council, and agreements which come into force upon signature, will normally be published in Zhong Hua RenMin GongHeGuo GuoJi TiaoYie Ji (Collections of Treaties of the People's Republic of China or Treaties Series of the People's Republic of China) by the Chinese Foreign Ministry¹⁰⁸. According to Chinese practice, once a treaty comes into force it becomes part of the domestic legal system and it is binding on the State of the People's Republic of China.

If a treaty provision is in conflict with the domestic law of the People's Republic of China, which one should prevail? Although the PRC Constitution is silent on this point, the recent development of the PRC regulations provides sufficient grounds to conclude that under current Chinese law, if a treaty to which the PRC is a party conflicts with Chinese domestic law, the treaty will prevail, except for any provision of a treaty in respect of which China has declared a reservation. Article 6 of the China Foreign Economic Contract Law of 1985 states "When an international treaty that relates to a contract and which the People's Republic of China has concluded or participated in has provision(s) that differ from the law of the People's Republic of China, the provision(s) of the said treaty shall be applied, with the exception of clauses to which the People's Republic of China has declared reservation."¹⁰⁹

This position is reinforced in the newly promulgated Civil Law of the People's Republic of China. The General Principles of Civil Law of the People's Republic of China provide that "when an international treaty that the People's Republic of China has concluded or participated in contains a provision different from the Civil Law of the People's Republic of China, the provision of the international treaty applies except for an article to which the People's Republic of China has declared a reservation."¹¹⁰

3. Direct Effect of International Treaties in China

a. International Practice

The notion of direct effect was first developed by the US Supreme Court.¹¹¹ It was later adopted by European countries¹¹², and further developed by the European Court of Justice¹¹³. It is generally accepted that an international treaty is directly effective if it can be directly applied by national courts and national authorities, if it establishes subjective rights and duties for the individual and if the individual can rely on it before national courts and national authorities. Direct effect presupposes first of all that the treaty can take effect within domestic law. This is possible, without involving the national legislature, as long as the monist doctrine is followed. On the other hand, if the dualist theory of the relationship of international law to municipal law is followed, a transformation, an adaptation or an implementation then becomes necessary, which is either embodied in the constitution or provided in some other way.

It is also widely accepted that the question of direct effect is essentially a problem of the enforcement of treaties and is a matter to be determined by the municipal law of a given state¹¹⁴.

b. Chinese practice

Professor Maresceau rightly pointed out that direct effectiveness does not live a life apart, but is intertwined with political, social

and economic realities¹¹⁵. This is specially true in China's case, where the legal system is undergoing a process of re-establishment and development, and the country has re-opened to the outside world only fairly recently. There is not only a lack of obvious answers to the notion of the direct effect of international treaties in the constitution texts, but also a lack of judicial decisions in rulings on this issue. It has been discussed by academics only rarely¹¹⁶. Nevertheless, positive signals, in favour of direct effect, are emerging from both legislative and judicial branches.

As discussed above, according to PRC's practice, once a treaty comes into force, it binds China at international level, and it also becomes part of domestic law; no further legislative action is required. In theory, therefore, there are no obstacles to prevent the application of a treaty in Chinese courts. Moreover, the recent legislative development, to let the treaty prevail over domestic laws as basic as the Foreign Economic Contract Law, the Civil Law and the Civil Procedure Law¹¹⁷, has paved the way for the direct effect of an international treaty in domestic law.

In Chinese case law, there has been very few cases involving the direct effect of an international treaty. However, in a case concerning a Soviet citizen who hijacked an aeroplane to China on 19th December 1985, the Harbing People's Court found the case admissible, relying on the Tokyo Convention, the Hague Convention and the Montreal Convention, to which China became a party in January 1978 and October 1980 respectively. It was a pity that the court did not go into any

detailed discussion of the direct effect of these conventions in China, but simply applied these conventions, and sentenced A S H Ogray (the Soviet hijacker) to eight years' imprisonment¹¹⁸. In its review, the Chinese Supreme People's Court confirmed the decision¹¹⁹.

It is interesting to observe in the direct effect analysis concerning China that, instead of case rulings, the Chinese Supreme People's Court, on at least one occasion takes initiative to give the legal opinions at the time when China accedes to the New York Convention on Recognition and Enforcement of Foreign Arbitration¹²⁰. In its circular on 10th April, 1987 to local high courts, intermediate courts and other special courts (such as the maritime courts), the Supreme People's Court made it clear that the Convention mentioned above is directly applicable in China's courts. And if the provisions of the Convention are different from provisions of the Chinese Law of Civil Procedure, the Convention, not the Chinese Law of Civil Procedure, applies except where China declared a reservation¹²¹, ie, (a) the convention should be applied reciprocally; and (b) it should not include the disputes between foreign (direct) investors and the host country government¹²². The Supreme People's Court does not lay down any criteria for the direct effect of an international treaty in China. It merely specifies which cases may be admissible in Chinese courts and what court has jurisdiction¹²³.

Although no criteria for direct effect have yet been established by the Chinese court, it is submitted that general international practice should be applied here. As China has increasingly more

interchanges with the international community, then more cases of this sort will inevitably come before Chinese courts. The court has to evolve its general approach towards the notion of direct effect.

4. The Possibility of Direct Effect of the 1978 EEC-China Trade Agreement

Since there have been few cases in China about the direct effect of an international treaty and, indeed, none on the direct effect of an international trade agreement, it is speculative to consider the direct effect of the 1978 EEC-China Trade Agreement. Nevertheless, a short discussion on this issue may still be helpful in understanding the way China implements international trade agreements.

a. Trade Agreements in General

Arguably, the Chinese government regards the trade agreements with other countries as matters between countries and governments, not directly involving the rights and duties of individuals of those countries. In these circumstances there is little chance for an individual to obtain a positive ruling as to the direct effect of a trade agreement. On the other hand, before the start of the fundamental reform in 1979, enterprises in China were either owned by the State, or owned collectively and the operation of these enterprises were subject to the State plan. Private individual business rarely existed. There was no necessity or possibility for enterprises to sue the government or its organs in the court, invoking

international trade agreements¹²⁴. Only in the last few years, when the private economy has played an increasingly more important role and the State-owned enterprises have been substantially decentralised¹²⁵ and probably most importantly, over fifteen thousand foreign subsidiaries or joint ventures have been established to the end of 1988¹²⁶, has it become even conceivable that an individual might invoke the international trade agreement to sue the government or its organs. An equally important factor is that, after thirty years of subordination to the government and indeed to the Party, the judicial system has gradually become mature while the judicial branch has become more independent. This gives a most important factor for the possibility of the direct effect of the international trade agreement in China¹²⁷.

b. The 1978 EEC-China Trade Agreement Analysis

As discussed in Part B, it is very unlikely that the European Court of Justice will give a positive ruling as to the direct effect of the 1978 EEC-China Trade Agreement because of its nature, its general wording and its imprecise provisions¹²⁸. The position may be the same before the Chinese courts. In an interview, judges in the High People's Court of Zhejiang Province suggested that it was not possible to hold that the 1978 EEC-China Trade Agreement had direct effect because there was no precedent and no clear and substantive rights and duties were accorded to individuals by the Agreement. They might view differently an international trade agreement which clearly created rights and duties for individuals¹²⁹.

The provisions of the 1978 EEC-China Trade Agreement do not establish clear rights and duties for individuals so Chinese courts are unlikely to give direct effect to this Agreement. For instance, Article 6 of the agreement states that both contracting parties should promote visits by "persons, groups and delegations from economic, trade and industrial circles." If, for example, a business group in Shanghai could not visit a company in Rome because the the Shanghai Municipal Government failed to give permission to the businessmen because of lack of foreign exchange, could these businessmen go to court, invoking the 1978 Trade Agreement, for an order that the Shanghai Municipal Government should grant the permission? If they did, would the Shanghai Intermediate People's Court give them a positive ruling? The answer seems to be in the negative. First, the provision invoked in the agreement was originally for other contracting party authorities to "grant each other the necessary facilities"¹³⁰ for mutual exchanges and contacts; second, the provision is too vague for direct applicability. In other words, it is not a mandatory provision and could not be invoked against government action (or non-action).

c. Conclusion

It is still too early to evaluate what sort of treaties may have direct effect in China. In applying certain treaty provisions, Chinese courts have tacitly accepted that an international treaty may have direct effect. Legal opinions from the Supreme People's Court also suggest that an international treaty may have direct effect in

China. Although no criteria for direct effect has been developed by the Chinese courts, it is certain that an international trade agreement which does not afford clear rights and duties to individuals, such as the 1978 EEC China Trade Agreement, will not be held to have direct effect.

D. Conclusion

The nature of the 1978 EEC-China Trade Agreement is clear; it is different from association agreements concluded under Article 238 of the Treaty of Rome; it is different from the agreements between the Community and its "overseas countries and territories" such as the Lomé Convention; it is also different from the free trade agreement between the Community and the EFTA countries. It is an ordinary trade agreement under Article 113 of the Treaty, concluded between the European Community and a country classified as a State-trading country on the basis of non-preference. Because of such nature, China as a developing country, does not have any preferential treatment from the European Community. In fact, the latter is imposing extra-quantitative restrictions on imports from China.

The 1978 EEC-China Trade Agreement is generally worded vaguely and lacks practical details. It is hardly possible to get a positive ruling from the European Court of Justice concerning the possibility of the direct effect of such an agreement. According to the case law development, the nature or basis of an agreement may not be the decisive factor in the consideration of the direct effect but the

Court has always attached great importance to the overall objectives of an agreement and to the specific purpose of a particular provision. An essential pre-requisite for finding a direct effect of a provision is the unconditional nature of an obligation created by the provision. Clearly, in order to be able to have a direct effect in front of the European Court, a clear, unconditional right must be created in the relevant provisions. The 1978 Trade Agreement in this regard has failed to meet such a condition. It only provides a basic legal framework for bilateral trade but the terms are flexible, each party as a last resort can take unilateral action, therefore, no unconditional obligations have been created. The European Court would be unlikely to rule it as a direct effect.

On the other hand, the Chinese courts do not develop rules governing the issue of a direct effect, although paradoxically, the application of an international treaty in China does not require a separate domestic regulation to adopt the international treaty. Because of the characteristics of the Chinese legal and political system, the issue of a direct effect of international treaty in front of the Chinese court has not arisen. However, in the recent development of economic reform and rebuilding the legal system, the individuals, particularly foreign investors in China, may raise this question in front of a Chinese court and the Chinese court should adopt the rules and criteria of how an international treaty can be a direct effect. In fact, in a recent case involving application of an international convention, the High Court in North East China simply applied the international convention without giving any explanation of

the criteria or conditions for direct effect of international treaty in a Chinese court, and the Supreme Court in Beijing upheld this decision. It seems that the Chinese court is adopting international practice as to how to deal with a direct effect issue.

Footnotes (Chapter IV)

1. The text of the Agreement, see OJ L 123, 1978
The initial discussion occurred during the visit to Beijing by Sir Christopher Soames, Vice-President of the Commission on May 4th - 11th, 1975. Bull. EC 5-1975 points 1203 & 1204; also Peking Review Vol 18 No 20 May 16th, 1975. See discussions in Chapters I and III.
2. Case 21-24/72 International Fruit Company v Produktschap voor Groenten en Fruit (1972) ECR 1226.
3. Case 181/73 R & V Haegeman v Belgian Government (1974) ECR 460 Para 5.
4. Hartly: The Foundation of the European Community Law 1979 p102 and pp172-175.
5. See Hans van Houtte: International Law and Community Treaty-Making Power. Northwestern Journal of International Law and Business 1981 p621.
6. Henry G Schermers: The Community's relations under public international law, in "Thirty Years of Community Law", European Perspective; Luxembourg; 1983, pp219-223.
7. Ibid p226 and super (5).
8. Third ACP-EEC Convention signed at Lomé in December, 1984, see Bull.EC 11-1984 point 1.1.1.
9. eg, the agreement on cocoa, 24 OJ L313/3, 1981 (International Cocoa Agreement of 1980); the agreement on textiles, 19 OJ L118/1 1974 (Council Decisions of March 21st, 1974 concluding the Arrangement regarding International Trade in Textiles), 20 OJ L348/59, 1977 (Council Decision of December 20th, 1977 concerning the Protocol extending the Arrangement regarding International Trade in Textiles). After the Tokyo Round the Community signed twelve GATT agreements, see 21 OJ L71/1, 1980 (Council Decision of December 10th, 1979 concluding the Multilateral Agreements resulting from the 1973 to 1979 trade negotiations).
10. eg, the agreement for co-operation on the peaceful uses of nuclear energy concluded with Brazil, 12 OJ No L79/7, 1969.
11. eg, the agreements on fisheries with Canada, Norway and Sweden, 23 OJ L226/2, 48, 52, 1980.
12. eg, the Barcelona Mediterranean Pollution Agreement 20 OJ L260/3, 1977; the agreements on a concerted action project in the field of physico-chemical behaviour of atmospheric pollutants, 23 OJ L39/19 1980.

13. For the nuclear research agreements concluded with the International Atomic Energy Agency, see Dauses article in 14 *Europarecht* 138, 139 (1979). The Community has also entered into agreements for co-operation in the field of thermo-nuclear fusion and plasma physics with Spain, 23 OJ L190/24 1980; Sweden, 19 OJ L162/28 1976; and Switzerland, 21 OJ L242/2 1978.
14. Countries that concluded Association Agreements with the Community explicitly under Article 238 of the Treaty include Greece, July 9, 1961 (J O 1963 294); Turkey, September 1963 (J O 1964 3687); Morocco, March 31, 1969 (J O 1969 L197); Tanzania, Uganda and Kenya, September 24, 1969 (J O 1970 L282); Malta, March 1, 1971 (J O 1971 L61); Cyprus, December 19, 1972 J O 197 L133). See *Encyclopaedia of European Community Law*; B *European Community Treaty II* at B10170/24.
15. Super (3).
16. The Association Agreement entered into force November 1, 1962. Greece became a member of the Community on January 1, 1981.
17. Signed in Ankara on September 12, 1963 and entered into force on December 1, 1964.
18. Article 28 of the EEC-Turkey Association Agreement.
19. ie, Two Yaounde Conventions, three Lomé Conventions and Arusha Convention (1969).
20. K Simmonds, *The Third Lomé Convention*, CML Rev 1985, p395.
21. eg, Lomé III, the arrangement of LLDCs and lock-countries.
22. See, *Collection of the Agreements concluded by the European Community* - Vol 1 with Austria, pp5-430; Portugal, pp747-1024
 - Vol 2 with Finland, p1; Norway, p213; Sweden, p377;
 Iceland, p527; and
 - Vol 3 with Switzerland, p3.
23. OJ L82/2 1974.
24. Articles 3, 4 and 5 of the Agreement.
25. Annex III of the Agreement.
26. Article 2 of the Agreement.
27. OJ L260/2 1976.
28. E Wellonstein, *Twenty-Five Years of European Community External Relations*, CML Rev 1979 p416; also K Simmonds, *The Evolutions of the External Relations Law of the EEC*, ICLQ Vol 28 1979 p646.
29. OJ L2024, 1983.

30. Bull EC 5-1974 point 2330.
31. Super 28. Also see Bull EC 6-1988 point 1.5.1.
32. Bull EC 6-1988 points 1.5.3 and 1.5.4.
33. Reuter, L'application du droit international par le juge Français (Paris 1972) p23. Cited from "The Direct Effect of International Agreements in the Community's Legal Order", Volker, Legal Issues of European Integration, 1983 p135.
34. There is a comprehensive book "The Effect of Treaties in Domestic Law", edited by F G Jacobs, which was published in 1987. The law and practice in major western countries has been carefully reviewed.
35. Case 26/62, Van Gend and Loos v Nederlandse Administratie der belastingen (1963) ECR 1.
36. T Hartly, The Foundation of European Community Law Chap 7, and P Pescatore, The Doctrine of "Direct Effect": an Infant Disease of Community Law, Vol 8 ELR (1983) p155.
37. Super (2).
38. See "Collection of the Agreement concluded by the European Communities" published by the Office for Official Publications of the European Communities.
39. Super (2).
40. Ibid.
41. Ibid.
42. Ibid, Ground N27.
43. Bebr, Agreements concluded by the Community and their possible direct effect: from International Fruit Company to Kuferberg, 20 CML Rev (1983) p45.
44. Case 40/72, Schroeder v Fed Rep of Germany (1973) ECR 125.
45. Case 38/75 (1975) ECR 1439.
46. Case 87/75 (1976) ECR 129 White EC Rev 1976 402.
47. Ibid, Ground N 25.
48. Ibid.
49. 1982 ECR 1331.
50. 1982 ECR 329.

51. Ibid, Ground N 14.
52. Ibid, Ground N 11.
53. Ibid, Ground N 16 at 348.
54. Ibid Ground N 18.
55. 1982 ECR 3641.
56. Ibid.
57. Ibid, pp3663-3664 Ground N 18.
58. Ibid, p3664 Ground N 20.
59. Ibid, p3664 Ground N 21.
60. Ibid, p3665 Ground N 22.
61. Ibid, Ground N 23.
62. Ibid, Grounds N 24-25.
63. Ibid, Ground N 26.
64. Super 46.
65. Super 49.
66. See Judgment of the Court of 18th February 1986 in case 174/84, Bulk Oil v Sun Oil point 1.
67. Ibid, point 3.
68. Ibid, point 10.
69. Ibid, point 10.
70. Ibid, point 19.
71. Ibid, point 10, 13, 14 and 19.
72. Supra 4.
73. See Article 132 of the Treaty of Rome and Article I of the Convention of Association.
74. See Article 2 of the Association Agreement.
75. Para 1 of the EEC-China Trade Agreement.
76. Para 1 of the Free Trade Agreement between Portugal and the Community.

77. Super 69 Article 9.
78. Super 55.
79. Hungdah Chiu, *The PRC and the Law of Treaties*, Cam Mass, Harvard University Press 1972
Jerom A Cohen and Hungdah Chiu, *People's China and International Law - a Documentary Study*, Princeton University Press 1974
Tiqian Chen, *The PRC and the Public International Law*, 8 Dalhouse Law Journal pp3-31 (1984), and
Gary L Scott, *Chinese Treaties*, Oceana Publication In 1975.
80. Ibid, see also: Zhou Gunshen, *International Law*, Commercial Publications House, Peking 1981 and Wang Ti-Yang and Wei Ming, *Public International Law*, Peking University Press 1983.
81. Wang and Wei, p27; Zhou, p17.
82. Article 31(11) of the 1954 PRC Constitution, adopted by the First Session of the First National People's Congress of the People's Republic of China, October 1954, Peking.
83. Supra 73.
84. Article 89 of the 1982 PRC Constitution, adopted by the Fifth Session of the Fifth NPC of the PRC, December 4 1982, Beijing.
85. Ibid.
86. Supra 74.
87. For example, the preamble of the Treaty of Peace and Friendship between the PRC and Nepal, signed on April 28, 1960, contains the statement that "the... plenipotentiaries, having examined each other's".
88. Cohen and Chiu, Supra p163.
89. McNiar, *The Law of Treaties* 2nd Ed 1961 p123.
90. Zhou Gunshen, *International Law*, Supra 74 p621. See, for example, Sino-Korean (North) Hydro-Electric Agreement, 6 Collections of Treaties of the People's Republic of China, p219 (1957).
91. Zhou Gunshen, Supra 74 p622.
92. See Judge Fitzmaurice's Report on the Law of Treaties in 2 International Law Commission Y B 104 & 111 (1956) UN Doc No A/CNo4/101.
93. Zhou Gunshen, Supra 74 p623.

94. James C Hsiung, *Law and Policy in China's Foreign Relations* Columbia University Press p237 1972.
95. Article 67(14) and 81 of the 1982 PRC Constitution.
96. The Decision of the Standing Committee of the NPC on the Procedures for Ratifying Treaties with Foreign Countries, October 16, 1954, in 1 *Compilation of Laws and Regulations of the People's Republic of China* p207 (1956).
97. Soames' visit to China, see Bull EC 5-1975 point 1.201 to 1.205.
98. China's "cultural revolution" was started in May 1966 and officially ended after the collapse of the "Gang of Four" in October 1976.
99. During the "cultural revolution" the Head of State, Chairman Liu Shao-qui was condemned and was put in jail. He died in 1969 and the post was empty until 1975. The 1975 amendment of the Constitution cancelled the post of Head (Chairman) of the State. The post of Head of State was restored in the 1982 PRC Constitution as President of the PRC.
100. See the 1975 amendment of the PRC Constitution.
101. Ibid.
102. Interviews with officials of MOFERT, and Bull EC 4-1978 point 1.5.1, 1.5.5.
103. OJ No L123/1 11.5.78.
104. Supra 96.
105. Zhou Gunshen, Supra 74 p653.
106. Ibid.
107. Lauterpacht-Oppenheim, *International Law* 11ed pp37-47
McNair, *Treaties* pp78-110
Verdross, *Le Fondement du droit Int'l dans l'Académie de la Haye, Recueil des cours*, 1927 I p271
O'Connell, *International Law* Camb press 1970 p55.
108. *Collection of Treaties of the People's Republic of China* by Ministry of Foreign Affairs of the PRC, World Affairs Publishing House, Peking.
109. *Foreign Economic Contract Law of the People's Republic of China*, adopted at the Tenth Session of the Standing Committee of the Sixth National People's Congress on March 21, 1985, came into force on July 1, 1985.

110. General Principal of Civil Law of the People's Republic of China, adopted at the Fourth Session of the Sixth National People's Congress on April 12th, 1986, came into force on January 1, 1987. The text, see People's Daily, April 17, 1986.
111. Sei Fujii v State of California 242 P 2nd 617 (1952).
112. F G Jacobs ed, The Effect of Treaties in Domestic Law, Sweet & Maxwell, 1987.
113. See discussions in Part B of this Chapter.
114. Supra, 106.
115. Ibid, at p21.
116. Zhou Gungshen p652.
117. The Law of Civil Procedure of the PRC (trial), promulgated by the Standing Committee of the Fifth NPC on 8th March, 1982, came into force on October 1, 1982.
Article 189 of the Law of Civil Procedure has a similar provision of the Article 142 of the General Principal of Civil Law of the PRC.
118. The Report of the Supreme People's Court of the PRC, 1986, Vol 2 20.6.1986 pp36-38.
119. Ibid.
120. The Report of the Supreme People's Court of the PRC, 1987 Vol 2 20.6.1987 pp16-17.
121. Ibid.
122. The Gazette of the Standing Committee of the NPC 1987 p243.
123. Supra, 114 paras 3 and 4.
124. Xiu Mu Qaio, "Issues on Chinese Socialist Economy", 1981 Beijing. See also Chapter II.
125. Report on the 13th Congress of the Chinese Communist Party by Zhan Zi-Yang 25.10.1987.
126. People's Daily, 24th March, 1989.
127. Du Feijing, "Forty Years of PRC Legal System". 4 Legal Studies of China Nos 1 and 2.

The events of Tiananman Square have greatly affected the development of the legal system in China. The notion of "rule of law" and "independent judicial system" have been deeply damaged by the declaration of martial law in Beijing.

128. See discussions in Part B.
129. An interview with judges in Zhenjiang High People's Court in September 1986.
130. Article 6 of the 1978 EEC-China Trade Agreement.

CHAPTER V

COMMUNITY RULES ON IMPORTS FROM CHINA

- A: Rules on Products which Are Liberalised
- B: Rules on Products which Are not Liberalised
- C: The GSP Issues
- D: Conclusion

CHAPTER V

COMMUNITY RULES ON TRADE WITH CHINA

Notwithstanding the MFN treatment, the Community still imposes quantitative restrictions on imports from China¹. The Community rules for dealing with China are, therefore, in two separate sets; one deals with products which are liberalised, ie, products which are not subject to quantitative restrictions; the other deals with products which are not liberalised².

This Chapter will discuss the legal problems of the Community's internal rules in respect of trade with China. Comparisons will be made with regard to the differences between the Community's internal rules and its international obligations, the difference between the Community's common rules for imports from China, the common rules for imports from other State-trading countries and the common rules for imports in general. The Community rules on the GSP, which is relevant to trade with China, will also be briefly discussed.

A. Community Rules for Chinese Products which are Liberalised

Soon after the first trade agreement with China was concluded, the European Community promulgated a Council Regulation on Common

Rules for Imports from China³ to replace rules established by Council Regulation (EEC) No 109/70 of 19th December, 1969 governing trade with China, as well as with other planned economy countries⁴. This Regulation was subsequently replaced by Council Regulation (EEC) No. 1766/82 of 30th June, 1982 (the "1982 Regulation")⁵. The 1982 Regulation provides that all products listed in the Annex to the Regulation may be imported into any part of the Community without quantitative restrictions, subject to specific exceptions and derogations provided for by the Community instruments⁶. Common rules established here in the 1982 Regulation (and previous Regulations) have the nature of co-ordinating actions of the Member States, and implementing the Trade Agreement between the European Community and China. These rules include information and consultation procedures, investigation and surveillance procedures and possible protective measures.

1. Liberalisation of Products

The products which are liberalised in the Community market means that such products will be able to enter into the Community from China without being subject to any quantitative restriction. These products were listed in Annex A to the 1978 Regulation and replaced by Annex A to the 1982 Regulation⁷. This Annex was updated on 30th June, 1984 to take account of amendments to the NIMEXE code and other changes⁸. The list of products in the Annex have been further expanded pursuant to Commission Regulation (EEC) No 268/85 of 31st January, 1985⁹.

The European Community has always been very restrictive and protective towards trade with China. In comparison with other countries, the liberalised products originating in China are far less than those originating in countries or regions other than those being classified as State-trading countries included in the list of countries contained in Annex II of Council Regulation (EEC) No 926/79 of May 1979 on common rules for imports (about 170 such countries and regions)¹⁰, but more than liberalised products originating in Eastern European countries. According to the 1978 Regulation and Council Regulation No 926/79, there are more than 300 CCT Heading Number products which are liberalised at Community level or Member States level, originating in 170 countries and regions in the list of Annex II of Regulation No 0926/79, which will be subject to quantitative restrictions if they originate in China¹¹. Although the list of liberalised products originating in China has been expanded from time to time, these products are still far less than those originating in other third countries. Clearly, the European Community maintains discriminatory quantitative restrictions against imports from China on the ground that China is not a member of the GATT, and China's special economic system. On the other hand, the liberalised products originating in China are always more than those originating in other State-trading countries, although only by a small margin¹². This practice reflects the Community's commercial policy of differential treatment, putting the State-trading countries in a more restrictive position than other trade partners. It also reveals the fact that the Community is willing to open its market to China more readily than to other State-trading countries, in return for getting a foot into the

huge potential Chinese market, and in return for China's willingness to conclude a trade agreement with it, although the extent of this opening up is strictly limited.

China has complained of the Community's unfair treatment towards it from time to time. China regards this treatment as protective and discriminatory and, therefore, unfair. China has requested on numerous occasions that the Community revoke all these unfair restrictions and liberalise products from China as stipulated in the Trade Agreement¹³.

According to the Trade Agreement with China it is the Community's obligation to liberalise products from China gradually. The European Community has liberalised a substantial number of products originating in China and imported into the Common Market, compared with the products liberalised before the conclusion of the Trade Agreement, or the liberalised products originating in other State-trading countries who refused to conclude a trade agreement with the Community individually at that time¹⁴. According to the 1983 Regulation and recent development, products originating in China (except textiles) currently subject to the quantitative restrictions are much less, for example, than the restricted products originating in the Soviet Union¹⁵.

The expansion of the scope of liberalised products is, however, a unilateral action by the Community¹⁶. The Community itself decides whether the specific products originating in China should be

liberalised according to the obligation in the Trade Agreement and the special situation in the domestic and international markets.

Negotiations, through the Joint Committee, may however play a very important role in this regard.

In cases where the European Community does not, under pressure from domestic industries, extend the list of liberalised products originating in China, or even reintroduces quantitative restrictions to previously liberalised products originating in China, could China challenge the Community's action in any way? First of all, the Community undertakes the obligation in the Trade Agreement to introduce, progressively, measures extending the list of such products. There is an international obligation, which is binding on the Community.

Secondly, this obligation, it is submitted, is on the condition that China will give favourable consideration to imports from the Community. In other words, if the Community can establish that China does not give the promised favourable consideration to imports from the European Community, or gives unfavourable consideration, the Community can accordingly refuse to expand the list of products liberalised.

Thirdly, the Trade Agreement leaves this issue open. Actually, the Agreement does not prevent the Community from not expanding the list of products liberalised, or even reintroducing the quantitative restrictions to previously liberalised products.

Finally, according to state practice, the Chinese government would not like to submit disputes on this issue to the European Court of Justice or any other international tribunal; the most important way for resolving disputes would be through discussions and negotiation through the Joint Committee.

2. Community Information and Consultation Procedures

In order to monitor the actual trade with China, the Community has established information and consultation procedures among the Commission and the Member States. According to the 1978 Regulation and the 1982 Regulation, the Member States must notify the Commission where the trends in imports appear to call for protective measures and where they find the granting of an import authorisation applied for might prejudice the success of any subsequent application of a protective measure¹⁷. The Commission will pass on the information to all other Member States¹⁸. The information required above must contain evidence based on the following criteria:-

- (a) the volume of imports, in particular where there has been a significant increase, either in absolute terms or relative to production or consumption in the Community;
- (b) the price of imports, in particular where there has been a significant price under-cutting as compared with the price of a like product in the Community;

(c) the consequent impact on the Community producers of similar or directly competitive products as indicated by trends in certain economic factors such as:-

- utilisation of capacity
- production
- stock
- market share
- price (ie, depression of price or prevention of price increase which would normally have occurred)
- profits
- return on capital employed
- cash flow
- employment¹⁹.

Where a threat of serious injury is alleged, the Commission will also examine whether it is clearly foreseeable that a particular situation is likely to develop into actual injury²⁰. In this regard, account may be taken of such factors as the rate of increase of exports to the Community, the export capacity in the country of origin or export already in existence or which will be operational in the foreseeable future, the likelihood that the resulting exports will be to the Community and China's special economic system²¹.

Once the information is provided by the Member State concerned, consultation may be held either at the request of a Member State or on the initiative of the Commission within eight working days following

receipt by the Commission of the information from the Member State²². Consultations are conducted within the framework of an advisory committee which consists of representatives of each Member State and a representative of the Commission as its chairman. The scope of the consultation covers an examination of the terms and conditions of imports, the import trends, the various aspects of the economic and commercial situations as regards the product in question and the measures to be adopted²³.

The Community rules for information and consultation procedures regarding imports from China are not substantially different from the rules regarding imports from other non-member countries, particularly from other State-trading countries, although the Community may take a more restrictive attitude when it examines the possibility of a threat of serious injury developing into actual injury involving imports from China and other State-trading countries²⁴.

3. Community Investigations and Surveillance Procedures

The Community investigation and surveillance procedures have also been established in accordance with the 1978 and 1982 Regulations and other rules set up by the Commission. Like the Community commercial policy in general, the Community also adopts a differential treatment policy regarding investigation and surveillance procedures. It once again puts China at a relative disadvantage insofar as the procedure and criterion for imposing the surveillance measures are concerned.

The Commission Decision 80/47/EEC of December 20th, 1979²⁵ laid down the Community procedures for surveillance and protective measures governing imports from all non-member countries. The 1978 Regulation and the 1982 Regulation also contain common rules on Community procedures for investigation and surveillance on imports from China.

First of all, if it is apparent from the consultations that there is sufficient evidence to justify an investigation, the Commission will announce the opening of the investigation in the Official Journal of the European Community, summarise the information sent to it and state the period during which the interested parties can make their views known in writing. It then begins the investigation, acting in cooperation with the Member States²⁶. The Commission will be in charge of obtaining all necessary information and verifying it with importers, traders, producers and trade associations where it is considered appropriate. Upon request the Member States must supply the Commission with all the information at their disposal on the

development of the markets of the product being investigated²⁷. The Commission will then submit a report to the Advisory Committee, which consists of representatives of each of the Member States, advising the Community on matters such as protective measures, at the end of the investigation. If the Commission considers that no Community surveillance or protective measures are necessary, after consultation with the Committee, it will publish a notice about the conclusion in the Official Journal. If it deems that one of the other measures is necessary, then it takes appropriate action. Notwithstanding the provision mentioned above, the 1982 Regulation stipulated that surveillance measures and, in an emergency, protective measures may be taken at any time if it is justified²⁸.

According to the 1982 Regulation, the Commission may impose three different types of surveillance measures against imports from China, where Community interests so require, either at the request of a Member State or on its own initiative²⁹. These surveillance measures are:-

- (a) retrospective surveillance; the procedure of such surveillance should be laid down by the Commission;
- (b) prior surveillance: in order to keep a check on trends in the imports in question, such imports should be made subject to the production of an import document. This document will be issued or endorsed by Member States³⁰;

- (c) where the situation of "causing or threatening to cause substantial injury to Community producers of like or competing products" is likely to arise, the Commission may:-
- (i) limit the period of validity of any import documents required under external trade regulations;
 - (ii) make the granting of such documents subject to certain conditions and, as an exceptional measure, make the granting of import authorisations subject to the insertion of a revocation clause or to the prior notification and prior consultation procedure discussed above³¹.

The surveillance against imports from China is more restrictive in comparison with the measures relating to imports from other non-member countries. First, the requirements for taking surveillance measures against imports from China are more easily satisfied than those from other non-member countries. According to Article 10 of Regulation 288/82, if the Community wants to take surveillance measures against imports from other non-member countries covered by that Regulation, it must find: (i) the development on the market in respect of a product originating in such a country threatens to cause injury to Community producers of like or directly competing products; (ii) the interests of the Community so require³². Whereas if the imports are originating in China, the only requirement is "Community interests so require."³³ In other words, if the Community considers that its interests require surveillance measures being taken, the

Community can always do so freely without any other requirements or preconditions specified by the Regulation.

Secondly, the procedure for taking surveillance measures makes action against imports from China much easier than against imports from other non-member countries. In the case of imports from China, the Commission may take action, either at the request of a Member State or on its own initiative, whereas in the case of imports from other non-member countries, "where the decision to impose surveillance is taken simultaneously with the liberalisation of importation of the product in question, that decision will be taken by the Council, acting by a qualified majority on a proposal from the Commission."³⁴ Obviously, such a requirement is more difficult to meet and takes a longer time.

Thirdly, the surveillance measure (c), ie, limiting the period of validity of any import documents, or making the granting of such documents subject to conditions, or subject to the insertion of a revocation clause, is only applicable to imports from China³⁵. It is not applicable to the countries under Regulation 288/82³⁶.

It is clear from the above discussion that both the procedure of surveillance and the requirement for surveillance have placed China in a position of being more closely watched and under more restrictive surveillance compared with other EEC trading partners under the Community rules for imports.

It is, however, not quite so in comparison with the position of other State-trading countries in the Community market³⁷. Although imports from these countries into the Community are governed by a different Regulation, all restrictive treatment in taking surveillance measures towards imports originating in these countries are basically the same as towards imports originating in China discussed above³⁸. Nonetheless, in at least two respects, imports from these State-trading countries are even more restrictively treated. First, where prior surveillance is imposed, the free circulation of the product in question is subject to the production of an import document, issued or endorsed by Member States³⁹. As far as China is concerned, the 1982 Regulation promises that such documents will be issued "free of charge, for any quantity requested and as quick as possible following submission, in accordance with the national law in force, either of a declaration or of an application by any Community importer, regardless of his place of business in the Community."⁴⁰ With respect to other non-member countries under Regulation 288/82, such document is guaranteed to be issued within five working days⁴¹. However, when it comes to other State-trading countries, such undertaking is not given. In other words, Member States have great freedom at their disposal to use administrative procedures and formalities as a weapon to protect their producers in delaying the issue of the documents⁴². Second, it has been authorised that the total value or quantity of the imports originating in China, together with other non-member countries, may exceed 5-10% of the value or quantity given in the import documents⁴³. Other State-trading countries, however, are not entitled to enjoy this flexibility⁴⁴.

4. Protective Measures

The 1978 Regulation and the 1982 Regulation give more freedom to the Community and the Member States for taking protective measures compared with the 1978 EEC-China Trade Agreement. Although both Regulations stipulate that when protective measures are taken, due regard for existing international obligations must be paid⁴⁷. When the protective measures are taken according to the 1978 and 1982 Regulations, both Regulations seem not to have taken into account the "friendly consultation" procedure required by the Trade Agreement before the adoption of such measures. The 1982 Regulation states that where a product is imported from China into the Community in such greatly increased quantities or on such terms or conditions as to cause, or threaten to cause, substantial injury to Community producers of like competing products, and if in its interest the Community may, acting at the request of a Member State or on its own initiative, take unilateral action⁴⁸. A Member State may also take such action (until the end of 1984) as an interim protective measure if it considers that there exists in its territory a situation as defined above⁴⁹. When the Commission takes such action, the only obligation it has is to notify the Council and the Member States promptly. The only obligation for the Member State in question when it takes such action is to inform the Commission and other Member States⁵⁰. Neither the Commission's action, nor the Member State's action is to be subject to any "friendly consultation" according to the 1982 Regulation. In this context, the Community has neglected the international obligations it has undertaken.

The Community was well aware of the gap between its international obligations and its internal common rules. In November 1983 Council Regulation (EEC) No 3421/83 was issued, entitled "Laying down certain detailed rules for the implementation of the Trade Agreement between the Community and China."⁵¹ The Regulation admits that it is necessary to lay down certain detailed rules for the implementation of the safeguard clause provided for in Article 5 of the Agreement, by way of derogation from Council Regulation (EEC) No 1766/82, ie, the 1982 Regulation, of June 30th, 1982, on common rules for imports from the People's Republic of China, and from Council Regulation (EEC) No 3420/83 of November 14th, 1983 on import arrangements for products originating in State-trading countries, not liberalised at Community level⁵². This Regulation also stipulates that where there are grounds for the application by the Community of safeguard measures as provided for in Article 5 of the Trade Agreement in respect of products liberalised by the Community, the consultation must have been completed⁵³. However, if the condition laid down in Article 5(2) of the Agreement (ie, the exceptional case) is fulfilled, the Commission or a Member State may take safeguard measures in accordance with the procedures laid down in Articles 11 and 13 of the 1982 Regulation respectively⁵⁴. A consultation will take place within the Committee provided for in Article 5 of the 1982 Regulation⁵⁵. In this way Regulation (EEC) No 3421/83 has thus amended rules established by the 1978 Regulation and the 1982 Regulation and filled the gap between the Community rules and its international obligations under the Trade Agreement.

The criterion for applying protective measures in respect of imports from China is the same as that for imports from other countries classified as State-trading countries⁵⁶. In respect of non-member countries other than those being classified as State-trading countries, however, the Community sets forth different criteria. In the case of imports from these non-member countries, the Community Regulation adds more requirements for the Commission or Member State to take any protective action. In addition to imports which "cause or threaten to cause substantial injury", a critical situation must be established in order to justify Community protective measures, which is not required at all in the case of imports from State-trading countries as well as from China. The Community may only take protective measures against imports from non-member countries other than State-trading countries "where a critical situation, in which any delay would cause injury which it would be difficult to remedy, calls for immediate intervention in order to safeguard the interests of the Community."⁵⁷ Furthermore, when the Community takes such measures, "where the establishment of a quota constitutes a withdrawal of liberalisation, account will be taken in particular of: (1) the desirability of maintaining as far as possible, traditional trade flows; (2) the volume of goods exported under contracts concluded on normal terms and conditions before the entry into force of a protective measure within the meaning of this Title, where such contracts have been notified to the Commission by the Member States concerned..."⁵⁸. The reason why the Community takes a more restrictive attitude towards alleged State-trading countries including China in the case of protective measures has been discussed in

Chapter III⁵⁹. Clearly the Community always keeps in mind the special economic system of the State-trading countries. In the Community's view, imports from these countries are more likely to cause market disruption; this is the basis for Community rules towards imports from these countries. The rules about the Community protective measures evidence this concern once more.

B. Rules for Chinese Products which are not Liberalised

One of the characteristics of the EEC trade law is its invocation of a substantial number of quantitative restrictions against its trade partners, particularly against Socialist countries. In order to regulate its imports of products subject to quantitative restrictions from alleged State-trading countries, including China, the European Community has progressively standardised the import arrangements since the early 1970's⁶⁰. The important rules were included in Council Regulation (EEC) No 3280/80, which was replaced by in Council Regulation (EEC) No 3420/83 (the "1983 Regulation")⁶¹. The 1983 Regulation provides detailed rules for the establishment of import quotas, for the amendment of that import arrangement and for the administration of it.

1. The Establishment of QR

As discussed in Chapter III, the Community has the discretion to impose unilaterally quantitative restrictions on selected imports from

China according to the Trade Agreement. The establishment of quantitative restrictions, and quotas for the products concerned, are all decided by the Community side. The Chinese side may contest the quantitative restrictions and ask the Community to lift such restrictions, but it is upon the Community to decide whether or not to lift them, and it is upon the Community to decide the amount of quotas for the products concerned. The rules laid down here by the Community are rather arbitrary and applicable to all State-trading countries including China, although the Community makes certain gestures to woo China.

The 1983 Regulation provides that the products listed in Annex III to the Regulation will be subject to quantitative restrictions in the Member States, and that the putting into free circulation of such products will be subject to the production of an import authorisation or equivalent document issued by the competent authorities in the Member States concerned⁶². Under the 1983 Regulation, before December 1st of each year the Council must lay down the import quotas to be opened by the Member States for the following year in respect of the various State-trading countries for the relevant products⁶³. However, if no Council decision has been made by that date, the existing import quotas will be extended on a provisional basis for the following year, in which case the Council will adopt, before March 1st of the new year, any necessary amendments to the import quotas thus extended⁶⁴.

Although these rules apply to all alleged State-trading countries including China, the Community, pursuant to its differential treatment policy, has granted China more favourable treatment within this framework, in comparison with other State-trading countries:

(i) As discussed in Part A, the Community has liberalised trade in more products originating in China, so that they are not subject to quantitative restrictions, than those originating in other State-trading countries. In the 1981 and 1984 Joint Committee meeting, the Community has, pursuant to the Trade Agreement, extended the list of products not subject to the quantitative restrictions⁶⁵.

(ii) In cases where the imports originating in China are subject to quantitative restrictions along with other State-trading countries, the Community tends to increase the amount of the quotas for China on several occasions; these increases may not be available for imports from other State-trading countries.

2. Administration of QR

The administration of quantitative restrictions is both conducted by the Commission and the Member States. The Community, and sometimes the Member States, has the power to amend the relevant quotas.

In cases where the Member State(s) intend(s) to increase imports exceeding the quantitative restrictions, the Member State(s) may take

the following action without having to initiate the amendment and consultation procedures:

(i) With respect to products subject to quantitative restrictions in a single Member State, in the light of the economic requirements of the market, the Member State concerned may exceed the amount of the quotas if the products are subject to quotas, or simply open import facilities, if quotas for the specified products have not been laid down⁶⁶.

(ii) With respect to products subject to quantitative restrictions in more than one Member State, in an emergency Member States may open further import facilities within the strictly defined annual limits provided for in accordance with the Regulation.⁶⁷

When a Member State, which is alone in maintaining a quantitative restriction, proposes to abolish or suspend such a restriction, it shall inform the Commission and the other Member States. The measure shall be adopted by the Commission within 10 working days.

Member States must inform the Commission of any measures they adopt, the measures shall not be subject to prior consultation but the consultation may be held retrospectively at the request of either a Member State or the Commission⁶⁸.

The import arrangements established may be amended at the request of Member States, subject to pre-consultation, to examine the effects of the proposed measures with regard to completion of common import

arrangements and to ensure that the proposed measures do not affect the proper functioning of the Common Market. In particularly urgent cases, measures to restrict import facilities by withdrawing liberalisation of one or more products, or abolishing or reducing a quota, may be applied by a Member State following the submission of a request for amendment to the Commission without awaiting the consultation within the Consultation Committee which would otherwise be required⁶⁹.

The amendment procedures do not take into consideration the consultation requirement, imposed by the Trade Agreement, the Community has concluded with China. As discussed in Part A, the Community has neglected its international obligation in this regard. This ignorance has been corrected by a special Council Regulation (ie, Regulation (EEC) No 3421/83). According to this Regulation, the amendment measures will be taken after consultation with China. In an exceptional case, however, where the situation does not admit any delay, the Member State may take unilateral action in accordance with the procedures discussed above⁷⁰.

A consultation committee has been established according to the 1983 Regulation, consisting of representatives of the Member States and chaired by a representative of the Commission⁷¹. The committee may examine questions concerning the application of the Regulation and relating to the administering of import arrangements in respect of State-trading countries. It may also deal generally with questions

relating to the administration of trade agreements concluded between the Community and such countries⁷².

C. GSP Issue

Soon after the Trade Agreement was concluded between the EEC and China, China became a beneficiary of the EEC's GSP scheme on January 1st, 1980. This part of the Chapter will discuss the EEC rules on GSP which are relevant to China.

1. Qualification as a Beneficiary Country

The European Community instituted a system of general tariff preferences for developing countries in 1971. Under this GSP scheme certain products, notably finished and semi-finished industrial products originating in the beneficiary countries, could enter into the Community market duty free. The primary purpose of the GSP is to increase the export earnings, to promote the industrialisation and to accelerate the rates of economic growth of developing countries⁷³. According to the very nature of the GSP the beneficiary countries will be the developing countries only.

Whether China should be able to qualify as a beneficiary country is an interesting issue. As discussed above the European Community is always in a dilemma as to how to treat China in bilateral trade relations. In some cases China is treated as a State-trading country, in others it is treated as a developing country. In its Trade

Agreement with China the Community has avoided clarifying this question, but the Trade Agreement was concluded on a non-preferential basis. However, in the first Joint Committee meeting under the Trade Agreement, the Community informed China it was to be treated as one of the EC GSP beneficiaries⁷⁴. On the contrary, the United States has clearly recognised China as a developing country in its Trade Agreement with China. Article 2 of the 1979 China-USA Trade Agreement has specifically provided that "the contracting parties note, and will take into consideration in the handling of their bilateral trade relations, that, at its current state of economic development, China is a developing country."⁷⁵ But ironically, the United States has never granted the GSP beneficiary status to China⁷⁶. In comparison with the United States GSP scheme, EEC's criteria for a GSP beneficiary country is more flexible, less politically restrictive and, therefore, easier to meet. Although there is no clear provision in the 1978 Trade Agreement and in the 1985 Economic Cooperation Agreement to recognise China as a developing country⁷⁷, the Community does recognise China, according to the degree and level of China's development and industrialisation, as a developing country in this regard.

2. Limited Operation of the GSP Application to China

The Commission proposed in July 1979 to include China among the beneficiaries of the Community's GSP scheme for all products covered, with the exception of agricultural products subject to quotas and sensitive industrial products⁷⁸. Special arrangements were planned

with regard to textiles and China's admission is conditional on the conclusion of an agreement on trade in those products⁷⁹. The Council has duly approved the proposal. In the following years the Commission has constantly proposed to expand the products coverage of the GSP for China⁸⁰. In the 1982 proposal, for instance, the Commission called for the extension to agricultural products of the GSP offer "in its entirety" to China⁸¹. But the Council has rejected the Commission's suggestions. Although the Council later gradually added more GSP products available to China, China is nevertheless a beneficiary country which has been subject to many restrictions according to the 1987 Scheme⁸².

3. Perspectives

As a developing country China's trade balance with the Community suffers considerable deficits. In 1985 and 1986 China's deficits with the EEC reached as high as \$3,346.2 million and \$5,464.8 million respectively⁸³. In the early stages of development and industrialisation Chinese exports to the Common Market are not highly competitive, especially the manufactured products. It is therefore essential that China can continue to be a GSP beneficiary country in order to keep healthy bilateral trade development. A recently passed Resolution of the European Parliament highlights this situation. The Resolution states "that the generalised preferences enjoyed by the People's Republic of China must be maintained, bearing in mind that its GNP is still very modest and that application of the preferences helps the growth of exports."⁸⁴

The GSP for China should not only be maintained, but also be expanded. The Community's restrictions on the GSP application on China has affected China's ability to expand its trade with the Community further⁸⁵. It is in both parties' interest to grant China full access to the EEC's GSP scheme.

D. Conclusion

The Community's Common Rules on Trade with China have a two-fold function: they function as an instrument of implementing the Trade Agreement; and streamline relations between the Member States within the Community regarding trade with China.

Notwithstanding the MFN clause in the Trade Agreement, the Community still imposes quantitative restrictions on imports from China. For products which are not subject to quantitative restrictions in the Community market, the Common Rules have established procedures for information and consultation, investigation and surveillance, and protective measures. For products which are under quantitative restrictions in the Community the Common Rules have also standardised procedures of how to create and amend the quotas and for the administration of the quantitative restrictions.

Clearly, the Community and the Member States not only keep discriminatory quantitative restrictions on a substantial number of imports from China, but also retain great freedom to amend quotas and

reintroduce quantitative restrictions on previous liberalised products.

It is interesting to see that both the 1982 and 1983 Regulations fail to keep in line with Article 5 of the EEC-China Trade Agreement by allowing the Member States total freedom of taking protective measures without complying with pre-consultation requirements of the Trade Agreement. The Community in this regard has neglected its international obligation in this respect.

However, the Community also unilaterally accorded China the status as a beneficiary country of the EEC's GSP scheme, although a number of products in the EEC's GSP scheme are not available for China. It is submitted that the Community should fully open its GSP benefits for China in order to further promote bilateral trade.

Footnotes (Chapter V)

1. See discussions in Chapter III.
2. The Common Rules dealing with products which are liberalised are specially issued towards China, whereas the Common Rules dealing with products which are not liberalised are designed to cover all State-trading countries. See, for example, OJ No. L306, 1978 and OJ No. L352, 1980.
3. Council Regulation (EEC) No 2532/78 of October 16th, 1978 on Common Rules for imports from the People's Republic of China OJ No. L306, 1978.
4. OJ No. L19, 26.1.1970 p1.
5. OJ No. L195/21, Council Regulation (EEC) No. 1766/82.
6. Articles 1, 11, 12 and 13 of Council Regulation (EEC) No. 1766/82.
7. See above notes 3 and 5.
8. OJ No. C181 9.7.1984 p21.
9. OJ No. L28 1.2.1985 p39.
10. OJ No. L131 29.5.1979 p15.
11. Ibid, and Supra 3.
12. Annex to Council Regulation (EEC) No 2532/78 of October 16th, 1978; Annex to Council Regulation (EEC) No 925/79 of May 8th, 1979; also Commission Notice 84/C181/01 and 84/C181/03.
13. See, for example, Bull. EC 2-1988 point 2.2.40, Bull. EC 11-1987 point 2.2.32; Economic Daily (Beijing) 21st May, 1988; Beijing Review 25th July, 1988 etc. The headline of the Economic Daily of 21st May, 1988 was "EEC shall accord same treatment to developing countries including China".
14. Only Romania entered into a trade agreement with the European Community in 1980 for industrial products. The Community liberalised products originating in Romania accordingly.
15. Council Regulation (EEC) No. 3420/83. OJ L346, 1983.
16. Article 2(1) of the 1978 Regulation.
17. Supra 3, Article 3(1)(a), (b) of the Regulation.
18. Ibid.

19. Ibid.
20. Ibid.
21. Article 9(2) of Regulation 1765/82 and Article 9(a) of Regulation 1766/82.
22. Article 4 of the 1982 Regulation.
23. Article 5 of the 1982 Regulation.
24. Taking into consideration of China's special economic system as required by the 1982 Regulation; see also Regulation 1765/82 and Regulation 288/82.
25. ie, Commission decision of December 20 1979 on surveillance and protective measures which Member States may be authorised to take in respect of imports of certain products originating in third countries and put into free circulation in another Member State. OJ No L16 22.1.1980 p14.
26. Article 6 of Regulation 288/82, 1765/82 and 1766/82.
27. Article 6 of the 1982 Regulation.
28. Article 7 of the 1982 Regulation.
29. Article 10 of the 1982 Regulation.
30. Ibid.
31. Ibid.
32. Article 10(1) of Regulation 288/82.
33. Article 10 of the 1982 Regulation.
34. Article 10(2) of Regulation 288/82.
35. Article 10(1)(c) of the 1982 Regulation.
36. Article 10 of Regulation 288/82.
37. Article 10 of Regulation 1765/82.
38. Ibid.
39. Article 10 of Regulation 288/82, 1765/82 and 1766/82.
40. Article 10(1) of the 1982 Regulation.
41. Article 11(1) of Regulation 288/82.
42. Article 10(1) of the 1982 Regulation.

43. Article 11(3) of Regulation 288/82 and Article 10(2) of the 1982 Regulation.
44. Article 10 of the 1982 Regulation.
45. Article 7 of the 1978 Regulation and Article 11 of the 1982 Regulation respectively
46. Article 9 of the 1978 Regulation and Article 13 of the 1982 Regulation respectively.
47. Preambles of both Regulations.
48. Article 7 of the 1978 Regulation and Article 11 of the 1982 Regulation respectively.
49. Article 9(1) of the 1978 Regulation and Article 13(1) of the 1982 Regulation.
50. Articles 7 and 9 of the 1978 Regulation and Articles 11 and 13 of the 1982 Regulation respectively.
51. OJ No L346 p91 1983.
52. Preamble of Council Regulation (EEC) No 3421/83, OJ No L346, 1983.
53. Article 2 of Regulation 3421/83.
54. Ibid.
55. Ibid.
56. Article 11 of Regulation 1765/82.
57. Article 15 of Regulation 288/82.
58. Ibid.
59. See Chapter III.
60. Council Decision No 72/455/EEC, OJ No L299, 31.12.1972 p46; Council Decision No 74/652/EEC, OJ No L358, 31.12.1974 p1; and Council Regulation No 3286/80 OJ No L353 29.12.1980 p1.
61. OJ No L346/6, 8.12.1983.
62. Article 2 of the 1983 Regulation.
63. Article 3 of the 1983 Regulation.
64. Ibid.
65. Supra 7, 8 and 9.

66. Article 4 of the 1983 Regulation.
67. Ibid.
68. Ibid.
69. Article 10 of the 1983 Regulation.
70. Article 3 of Regulation 3421/83, OJ No 346 8.12.1983 p91.
71. Article 12 of the 1983 Regulation.
72. Ibid.
73. J.H. Jackson 1986 p1159.
74. EC Bull 7/8-1979 point 2.2.60.
75. Article 2 of the 1979 China-USA Trade Agreement.
76. Supra 73, p1161, also G.G. Wang, Legal Aspects of US-Sino Economic Exchanges, New York 1986.
77. Article 13, 1985 EEC-China Agreement on Trade and Economic Cooperation OJ No L750/4 19.5.1985.
78. OJ No C234/144 17.9.1979 EEC GSP Scheme for 1980.
79. Ibid.
80. Bull EC 7/8 - 1980 point 2.2.22, Bull EC 7/8 - 1981 point 2.2.19 and Bull EC 7/8-1984 point 2.2.38.
81. Ibid.
82. Council Regulation (EEC) No 3921/86, 3925/86 and 3926/86 OJ No L373, December 31st, 1986.
83. Supra, Chapter III Note 19.
84. Resolution on Relation between the European Community and the People's Republic of China, OJ No C190/115 20.7.1987.
85. Bull EC 11-1985 point.

CHAPTER VI

1985 COOPERATION AGREEMENT

- A. Trade Framework
- B. Areas of Economic Cooperation
- C. Investment Clause
- D. Community's Competence on Cooperation Agreement
- E. Effect and Conclusion

CHAPTER VI

THE 1985 AGREEMENT ON TRADE AND ECONOMIC COOPERATION

When the 1978 Trade Agreement was due to expire, both parties agreed to extend it for one year¹. But this Agreement eventually proved to be an insufficient framework for bilateral economic exchanges. First and foremost, EEC-China economic contacts and exchanges increased beyond the scope of trade. The Community started to finance development projects in China in 1984², but the 1978 Agreement did not provide a legal basis for such activities. Second, although the trade between the EEC and China has increased from ECU1,820 million in 1975 to ECU6,718.9 million in 1984, the amount of trade between the EEC and China was still far behind the amount of trade between China and Japan, and between China and the United States for the same period of time³. Both sides admitted that the potential for trade and economic cooperation between parties is far from exhausted⁴. There was, therefore, a mutual desire to see the Agreement expanded to include wider areas and provide for broader legal bases. The EEC-China Trade and Economic Cooperation Agreement (the "Cooperation Agreement") was thus concluded in 1985 to replace the 1978 Agreement⁵.

A. Trade

The first part of the Cooperation Agreement concerns matters of bilateral trade. It follows the rules in the 1978 Agreement. The provisions relating to trade include an MFN clause, a safeguard clause, a price clause and a balance of trade clause; both parties making the same commitment as in the 1978 Trade Agreement to such an extent that identical wording is used⁶. However, the Cooperation Agreement takes into account the different stages of economic development between the Community and China; this fills the gap in the 1978 Trade Agreement relating to different levels of economic development between two contracting parties⁷. Article 13 of the Cooperation Agreement states that in view of the difference in the two contracting parties' level of development, the European Economic Community is prepared, within the context of its development aid activities, and the means at its disposal and in accordance with its rules, to continue its development activities in China. But this does not mean the Community is going to classify China as a developing country in bilateral trade relations, nor does it change the Cooperation Agreement from a non-preferential one into a preferential one. This provision is only recognising the different stages of economic development between the Community and China and is addressing the problem of financial cooperation and the Community aid activities rather than the problem of trade relations. The Community continues to treat China as a non-market economy without paying attention to the changing economic structure in China and still imposes discriminatory quantitative restrictions to a large number of products originating in

China. Like the 1978 Trade Agreement, both parties retain great discretion in trade policies regulating bilateral trade relations. The actual operation of bilateral trade are regulated through discussions and negotiations in the Joint Committee under the Cooperation Agreement. Under such circumstances, the party who has stronger economic power is in fact in a better position. The European Community, therefore, still has advantages over China in bilateral trade relations.

B. Areas of Economic Cooperation

The main feature of the Cooperation Agreement is not that it incorporates provisions to facilitate economic cooperation between China and the European Community, but that it facilitates such cooperation with China at the Community level. The Member States have individually conducted economic cooperation with China in various areas before the Cooperation Agreement was concluded. Up to the end of 1980 all Member States except Ireland had concluded economic (and technical) cooperation agreements with China⁸. The provisions for economic cooperation are, therefore, no more than a recognition of the existing practice as far as the Member States are concerned. However, the Community's cooperation activities are conducted at the Community level, which are supported by the Community budget. Also, these activities shall be supplementary to the Member States' cooperation activities but not conflicting with each other.

The areas of economic cooperation is to extend to every possible sector according to the Cooperation Agreement. It includes, in particular, industry and mining; agriculture and agro-industry; science and technology; energy; transport and communications; environmental protection and cooperation in third countries⁹. These areas correspond to the Community's competence in external relations explicitly and implicitly granted by the Treaties establishing the Community. According to the wording in Article 10 of the new Agreement, no spheres of future cooperation are excluded as long as they fall within the Community's competence.

The Cooperation Agreement has not only broadly mentioned the areas for cooperation, but has also encouraged the application of the various forms of industrial and technical cooperation for the benefit of undertakings or organisations on both sides. Among other activities, the Cooperation Agreement specifies the following methods and forms of cooperation: joint production and joint ventures; common exploitation; the transfer of technology; cooperation between financial institutions; visits, contacts and activities designed to promote cooperation between individuals, delegations and economic organisations; the organisation of seminars and symposia; consulting services; technical assistance, including the training of staff; and a continuous exchange of information relevant to commercial and economic cooperation¹⁰. These forms and methods of cooperation had already been utilised when the Cooperation Agreement between the Community and China was concluded both at Member State and Community level.

The defect of the Cooperation Agreement with respect to the economic cooperation provisions is that it lacks any practical details. It only provides that the two contracting parties agree to develop economic cooperation in all these areas; and recommends the forms and methods for such cooperation. Without being supported by any cooperation scheme and programme, the Cooperation Agreement fails to address the question of how to apply these methods. In this regard these provisions are only a statement of general policy or political goodwill. It lays down a primary legal basis; the development of the economic cooperation is very much dependent upon the contracting parties implementation of the Agreement. Nevertheless, the Community promises that within the means at its disposal, and in accordance with its rules, it will continue its development activities in China and examine the possibility of stepping up and diversifying these activities¹¹.

In comparison with the Lomé Convention, the difference between the Lomé Convention and the EEC-China Cooperation Agreement is obvious. The former is special; because of the historical relations between the Member States of the Community and the ACP countries, the Community made a special commitment towards these countries. It has committed itself to help "to promote the economic and social development of the countries and territories" concerned in the Treaty of Rome¹². In order to attain this purpose, the Community established association relations with them. The Lomé Convention reflects the development of the relations between the Community and the ACP countries from the first Yaounde Convention¹³. It represents a much

closer economic relationship than that between the EEC and China. The Lomé Convention has, therefore, more advanced schemes compared with other ordinary economic cooperation agreements. The economic cooperation between parties under the Lomé Convention are supported by detailed arrangements and programmes. The Sysmia (or Minex) scheme, for instance, has been arranged to encourage the Community to investment in mining and energy industries in the ACP countries in Lomé II¹⁴. With respect to the cooperation in agricultural areas, the Lomé III provides for many concrete programmes. In recognition of the dependence of many ACP states upon earnings from their export of agricultural commodities, in addition to the improvements in the Stabex scheme¹⁵, a Joint Committee on Agricultural Commodities has been established¹⁶, so that cooperation in this area can be more closely coordinated and monitored; in addition, the states' parties have agreed to improve and intensify their consultation procedures prior to the conclusion or renewal of global commodity agreements¹⁷. The framework and scope of long-term campaigns for the preservation of natural ecological balances in the ACP states, and especially for drought and desertification control, is established¹⁸. Greater support is also being provided for the ACP states' own food policies and strategies. For financial and technical cooperation, the European Community has undertaken to provide during Lomé III a total sum of ECU8,500 million in EDF funds and ECU1,000 million in own resources from the EIB²⁰. In accordance with these development activities undertaken by the Community, the Lomé Convention characterises as an advanced preferential cooperation agreement. In this respect, the EEC-China Cooperation Agreement is similar to the cooperation

agreements between the EEC and India, between the EEC and Brazil and between the EEC and Canada²¹.

Notwithstanding the primary, broad and somehow insufficient legal basis for economic cooperation, various economic cooperation projects have been undertaken. These cooperation activities are mainly concentrated in the areas of promotion of economic and trade relations, agricultural, science and technology, energy and education and training etc. The Community has started to finance different development projects even before the Cooperation Agreement has been concluded. From 1984 onwards the Community has provided ECU6 million annually to support the transfer of technology using in Chinese agriculture and the food processing industry in eleven projects and the 1988 budget has been increased to 8.6 million ECU in two projects²². The Community employed another ECU3 million in supporting Chinese exports²³. In addition to that, the Community also spent million of ECU on technical cooperation with China in the areas of mining, electric power, chemical and non-ferrous metal industries, in which over 60 projects have been involved²⁴. During 1987 to 1988 another two major cooperation projects have also been established. In March 1987 an exchange of letters was signed between two parties with a view to the establishment of a Centre in Beijing for the coordination of biotechnological research for applications in agriculture and medicine. The principal task of the Centre will be to coordinate research projects carried out jointly by Chinese and European laboratories with Community aid totalling 80 million ECU over five years²⁵. On March 1st, 1988 the EEC signed an aid agreement with

China for the development of the country's milk industry. Under the agreement, during 1988 to 1992, the Community will provide 45,000 tons of de-fatted milk powder and 15,000 tons of dehydrated butter (worth about ECU71.65 million) as well as ECU4.5 million in financial aid to twenty major cities including Beijing and Shanghai. These cities will sell liquid milk made with milk powder and butter and use the revenue from this selling, the EC monetary aid and local funding to develop the Chinese domestic dairy industry²⁶. The aid will be mainly directed to the following areas:-

- (a) providing experts and offering technical consultancy to help China work out a national strategy for the development of milk production;
- (b) providing managerial technology and formulating a comprehensive production plan;
- (c) providing new technology and establishing dairy product enterprises;
- (d) assisting Chinese enterprises in improvements of processing, packaging and storage facilities;
- (e) training Chinese technicians to increase milk production²⁷.

The economic cooperation between the EEC and China is just at start point, it has a bright prospect insofar as China's development

potential and the Community's economic power are concerned. There are signs that the Community was seeking to increase official commitment in China. Such a move may help the Community to improve its position in China vis-a-vis its competitors, ie Japan and the United States. However, it is submitted that as both parties contain different political systems, the development of economic cooperation requires a long-term mutual trust and understanding between the parties. Without close and good political relations it is impossible for both parties to undertake substantial economic cooperation²⁸. On the other hand, economic cooperation shall not only serve as evidence of good relations, but shall also be mutually beneficial economically, because it is not merely an emergency aid programme. In other words, the economic cooperation activities shall be helpful for China's economic development and also helpful for strengthening economic ties between China and the Community. And from the legal point of view the Cooperation Agreement is only a basic framework, more detailed cooperation schemes should be worked out alongside the development of economic cooperation.

C. Investment Clause

There is an investment clause in the Cooperation Agreement which states that "the two Contracting Parties shall agree, within the framework of their respective laws, rules and policies, to promote and encourage greater and mutually beneficial investment"²⁹.

This clause is incorporated into the agreement against the background of China's policy of opening up the door to attract foreign investment; and the relatively low share of investment in China from the Community. From the late 1970s China has started to open its door to the outside world. In 1979 the Chinese government promulgated a joint venture law to encourage foreign investment in China for the first time in the history of the People's Republic³⁰. Since then a great many laws and regulations have been promulgated to accommodate foreign investment³¹. By the end of 1988 there were over 15,300 foreign investment projects which were established in China in the form of equity joint ventures, contractual joint ventures and wholly foreign-owned enterprises³². The total commitment of investment is over US\$ 25 billion³³. However, the Community's share of investment in China was comparatively small up to the end of 1984 when the negotiations for the Cooperation Agreement began. The statistics show that the Community's share of foreign investment in China was far behind that of the US, Japan and Hong Kong³⁴. On the other hand, Western Europeans are popular investors in China because they usually engage in manufacturing projects. The investment from Europe often involves the transfer of relatively advanced technologies which are much appreciated by the Chinese³⁵. Investment in China by Europeans has increased since then. To the end of 1987 there were 167 investment projects with US\$ 1.4 billion invested³⁶. Major Community investors include Philips (Netherlands), Volkswagen (Germany), Peugeot (France), Pilkington (UK) and Bell (Belgium). China wanted an investment clause to be included in the Cooperation Agreement. It is

China's consistent intent to further strengthen economic relations with the European Community to diversify its economic relations ³⁷.

The investment issue arose in the Community before the Cooperation Agreement had been concluded. The European Parliament passed a resolution on April 13th, 1984, in which the suggestion was made to investigate the possibility of concluding an investment protection agreement with China at the Community level³⁸. If an agreement as such had been concluded, it would have been a great innovation for the Community - no similar agreement has been concluded so far. Clearly, it is a shared competence between the Community and the Member States over the matters concerning investment promotion. The Member States are still exercising their powers to conclude investment agreements with non-member states³⁹. As far as the investment protection is concerned, the individual Member States alone exercise the competence to conclude agreements with the third countries. The Member States are unlikely to give up this power to the Community. Of course, a mixed agreement would be possible theoretically, but in practice it takes a long time and would be a more complex negotiation. In fact, the Federal Republic of Germany concluded an investment agreement with China in 1983 and France, Italy and the Belgium-Luxembourg Economic Union also concluded investment agreements with China before the Cooperation Agreement had been concluded. Now all major capital export Member States, including Holland and the United Kingdom have concluded investment protection agreements with China individually⁴⁰. In these circumstances the Community did not accept the Parliament's suggestion, but simply

confirmed the practice between the Member States and China in the Cooperation Agreement by adding an investment clause in the Cooperation Agreement.

The investment clause further provides that: "the Parties undertake to improve the existing favourable investment climate in particular through encouraging the extension, by and to the Member States of the Community and by and to the People's Republic of China, of investment promotion and protection arrangements based on the principles of equity and reciprocity"⁴¹.

The bilateral investment protection agreements between individual Member States and China have been concluded in the form of investment promotion and protection treaties which normally include the following major provisions:-

(a) Each side shall give investors from the other side treatment no less favourable than that enjoyed by third country investors⁴², and shall not discriminate against investment from the other side in comparison with measures taken in respect of investors and investments of third states, as long as domestic law is not compromised⁴³.

(b) Each side shall compensate the other if it must expropriate or nationalise the latter's investment for public interest reasons⁴⁴. If the investor and the expropriating side fall into dispute over the amount of compensation, the case may be submitted either to the national courts of the contracting party in whose territory the

investment is being made or to international arbitration in the form of an ad hoc arbitration tribunal. The applicable law for the arbitration tribunal under the following treaties would be:-

- (i) the German-Chinese treaty: the provisions of the bilateral agreement, the specific investment arrangement and general principles of international law⁴⁵;
- (ii) the French-Chinese treaty: the domestic law of the contracting party in whose territory the investment is situated, and the provisions of the bilateral agreement⁴⁶;
- (iii) the Belgium-Chinese treaty: the domestic law of the country in which the investment is situated, the provisions of the bilateral agreement, the specific investment arrangement and "principles of international law generally recognised and adopted by the contracting parties"⁴⁷.

The treaties between China and Germany, France and the UK also carry a side letter providing for an Additional Protocol if and when China adheres to the Washington Convention of 1965 for the Settlement of International Investment Disputes ("ICSID")⁴⁸.

(c) Each side shall ensure the other side's right to transfer freely to the country where they reside their investments or returns⁴⁹. The transfer of profit, interest, dividends, royalties or

fees of a minimum of 20 per cent a year is guaranteed in the China-UK treaty⁵⁰.

(d) The two sides shall make use of friendly consultation through diplomatic channels if a dispute arises from the interpretation of the agreement and related law. The dispute may be submitted to international arbitration if it has not been settled within a certain period of time⁵¹.

(e) In the China-UK treaty, there is a subrogation clause according to which, if one contracting party or its designated agency makes a payment to its national or company under an indemnity given in respect of an investment made in the territory of the other contracting party, the former contracting party shall have all the rights and claims of the national or company indemnified⁵².

In sum, the investment clause in the Cooperation Agreement is only a call for improving the existing investment climate, to promote and encourage more investment⁵³. The European-China investment relations are regulated by the treaties concluded between the Member States and China individually. These relations are basically harmonious; China has been trying very hard to improve its investment climate, and investments from the Member States of the Community have been increased gradually⁵⁴. Especially because the Member States take a relatively liberal attitude to the transfer of technology, the Community has become the major supplier of high-tech to China⁵⁵.

However, the Community's investment in China is still far behind that of the USA and Japan⁵⁶.

D. The Community's Competence in Concluding Cooperation Agreements

The division of powers between the Community and the Member States in respect of concluding economic cooperation agreements with non-member states is not very clear. The Community has exercised its powers in concluding economic cooperation agreements with non-member states for a long time⁵⁷. It has concluded agreements involving economic cooperation with third countries from very early days⁵⁸. However, these agreements were not mainly concerned with matters of normal economic cooperation, but concentrated on association matters under Article 238 of the Treaty of Rome⁵⁹. Further, these association agreements were signed both by the Community and the Member States⁶⁰, ie, so-called mixed agreements⁶¹. Although the commercial cooperation agreement concluded between the European Community and Israel in 1975 had a special provision to regulate economic cooperation⁶², the first agreement of economic cooperation was concluded with Canada in 1976⁶³. Since then a number of economic cooperation agreements have been concluded, including ones with Brazil⁶⁴, India⁶⁵, Pakistan⁶⁶, Member States of the South-East Asia Union⁶⁷ and China, etc.

The Community's power to conclude economic cooperation agreements, however, is not exclusive. Member States still have the power to conclude economic cooperation agreements with third countries, and economic cooperation agreements concluded by the

Community must correspond to the Community's competence, explicitly or implicitly provided for by the Treaties, and developed by the case law of the Court of Justice. In most economic cooperation agreements concluded by the Community, the designated cooperation areas normally involve industry and mining, agriculture, science and technology, energy, transportation and communication, environmental protection, etc⁶⁸. Due to the vagueness of the division of the power between the Community and its Member States, there are certain overlaps in cooperation between the Member States and the third country, and between the Community and the third country concerned. Cooperation in science and technology with a third country, for instance, is both conducted by the Community and the Member States. Therefore, the Cooperation Agreement between China and the Community providing for cooperation in science and technology does not exclude the cooperation between China and the Member States of the Community in science and technology⁶⁹. Indeed, the Community cooperation activities should be supplemented by the cooperation activities undertaken by the Member States, and not conflicting with each other. For the time being, the Community competence in economic cooperation shall be extended, particularly when the single market comes to be the reality in 1992. The Community would then bear more responsibility both in internal market and external relations and it will have more power in exercising economic cooperation with third countries correspondingly.

On the other hand, when the Member States conclude economic cooperation agreements with third countries, these agreements cannot prejudice the relevant provisions of the Treaties establishing the

European Community. Before such agreement is concluded, a consultation procedure laid down by Council Decision No 74/393/EEC of July 22nd, 1974 must be followed⁷⁰. The Decision requires that cooperation agreements between Member States and non-member states and any commitments and measures planned in the framework of such agreements must be in accordance with the common policies of the Community and with the common commercial policy of the Community in particular. The negotiation and implementation of such agreements should, therefore, be subject to a prior consultation procedure⁷¹. In so doing, Member States shall inform the Commission and other Member States of any agreement which they propose to negotiate; and of commitments and measures which are proposed by the authority of Member States. The Member States shall forward to the Commission and other Member States the text of cooperation agreements initialled with third countries⁷². If so required by a Member State and proposed by the Commission, this information shall be subject to prior consultation with other Member States and the Commission. Such consultation is intended:

- (a) to ensure that the agreements, commitments and measures proposed are consistent with common policy, in particular with the common commercial policy;
- (b) to encourage coordination with regard to the relations with the third countries concerned; and

- (c) to examine the advisability of unilateral measures which could be taken by the Community in the fields covered by Article 113 of the Treaty in order to promote cooperation projects⁷³.

There were controversies within the European Community at the very beginning with regard to what sort of agreement should be concluded between the Community and China. According to the European Parliament, an economic cooperation agreement should have been concluded much earlier. As early as 1977 the European Parliament called for broad economic cooperation. The report of its External Economic Relations Committee of May 5th, 1977 recommended that the agreement with China "should be used not only to settle the technical trade and customs problems contained in the outline agreement, but should also provide a framework for a progressive and pragmatic development of economic relations between the parties"⁷⁴. The rapporteur supplement of the External Relations Committee was in fact even more precise, and it wondered whether the EEC-Canada model of economic agreement "would not be the best way of increasing cooperation between the EEC and China"⁷⁵. This suggestion, although supported by the Commission, was not accepted by the Council⁷⁶. The Council opted for a limited trade agreement rather than a broad economic cooperation agreement with China at that time. The first agreement between them therefore was a limited trade agreement.

The Council option reflected not only the Community's caution in dealing with external relations in the early days, but also reflected China's situation in the later 1970s. First of all, the Member States

would not easily give up the power to conclude economic cooperation with a third country. The Council, as the representative organ of the Member States, was reluctant to accept the fact that the Community has the right to conclude an extensive economic cooperation agreement. Also, it is the Community's general practice first to conclude trade agreements with non-associated third countries, then to develop an economic cooperation agreement at the Community level. Particularly as China was classified as a State-trading country, the Council did not want to conclude an economic cooperation agreement with China at the first instance. On the other hand, China had not recovered from the "Cultural Revolution" during that period of time. The internal political struggle was going on between the Maoist leftists and the pragmatists. More importantly, China did not start to reform its economy systematically until 1979⁷⁷. The political and economic situation in China, it seemed to the Council, made it not desirable for the Community to conclude a comprehensive economic cooperation agreement with China⁷⁸. A broad economic cooperation agreement between the EEC and China therefore did not come into reality until 1985.

A number of Member States, however, concluded economic cooperation agreements with China between 1978 and 1980⁷⁷. These agreements provided for economic cooperation between the Member States concerned and China in similar or the same areas as provided for by the Cooperation Agreement. Even after the Cooperation Agreement was concluded, various economic cooperation agreements with China at the Member State level have also been concluded⁸⁰. This is not

inconsistent with the EEC-China Cooperation Agreement. In fact, the Cooperation Agreement states that this agreement and any action taken thereunder shall in no way affect the powers of any of the Member States of the Community to undertake bilateral activities with China in the field of economic cooperation and conclude, where appropriate, new economic cooperation agreements with China⁸¹.

Some conclusions

The Cooperation Agreement corresponds with the development of economic exchanges between the Community and China. It explores new areas to cooperate, provides a broader legal framework for future cooperation, and many development and economic cooperation projects have been developed under the capacity of the Cooperation Agreement. But this agreement adheres to certain limitations.

First of all, the Cooperation Agreement does not resolve any problem in trade relations. It does not make any progress in abolishing and diminishing trade restrictions on both sides. The Community still employs quantitative restrictions to control imports from China. The Chinese, on the other hand, do not open any wider their market to the Community than the 1978 Trade Agreement did. Also, the Cooperation Agreement does not tackle any problems on intellectual property or commercial arbitration issues. On the face of it, the Cooperation Agreement is still a non-preferential agreement but because of the relative unequal economic positions, the Community enjoys great advantages over China. Furthermore, over the years, the

Community has developed a trade policy of differential treatment. It has granted more preferential treatment towards the ACP countries, EFTA countries, Mediterranean countries etc. Consequently, China is in a position of being treated most disadvantageously in comparison with other EEC trading partners. In this regard, the Cooperation Agreement not only does not grant China treatment compatible with its position as a developing country, but also confirms the Community's practice of putting China in a most disadvantaged position.

Secondly, the Cooperation Agreement does not, as argued above, provide any practical detail for economic cooperation, nor has any clear financial commitment been made to support the cooperation scheme. In this regard, therefore, the Cooperation Agreement is more an expression of political goodwill than a practical comprehensive economic cooperation framework. The development of actual cooperation would very much depend upon the relations between the parties. Because of the alleged good relations, the Community has undertaken a considerable number of cooperation activities in China and there are signs that the Community was prepared to make more commitment. The "Beijing Event" in June 1989 seriously damaged bilateral relations, the Community, in the author's view, should nevertheless continue the cooperation activities for both parties' interests.

Furthermore, it is submitted that it is hardly possible that the European Court of Justice will give a positive ruling on the issue of direct effect of the Cooperation Agreement because of the very nature of it and the non-specific provisions which, in the author's view, do

not create rights and obligations to the individuals of both parties. Nor will the Chinese courts give a positive ruling in this regard.

However, the Cooperation Agreement establishes a broad legal basis for economic cooperation. The contracting parties have started to cooperate in various areas provided for by the Agreement but such cooperation is far from enough considering the sizes of both parties and the said good political relations. The great potential for economic cooperation should be developed and supported by more commitment in a mutually desirable and beneficial way. The Community now is picking up more power in external economic relations. It shall develop a more detailed cooperation scheme with China and encourage more European investment in China, whereas the Chinese should not only open up more market to the Community, but also further improve the investment climate to attract more investment from the EEC.

Footnotes (Chapter VI)

1. Bull EC 11-1983 point 2.2.43
2. Bull EC 5-1985 point 1.9.2
3. GATT International Trade 1984/5 (Geneva 1985) Appendix Table A31
4. De Clercq speech at the ceremony of the signing of the EEC-China Trade and Economic Cooperation. See Bull EC 5-1985 point .15.1
5. OJ No L250/1 19.9.1985
6. Ibid, see also the discussion in Chapter III
7. Article 13 of the Cooperation Agreement
8. See note 77 below
9. Article 10
10. Article 11
11. Article 13
12. Article 131, Treaty of Rome
13. JO 1964 1430
14. K R Simmonds, 17 CML Rev (1980) p105 and Lomè II Articles 49-59
15. Lomè III Articles 147-174; Lomè II Articles 23-41. A total sum of ECU925 million has been allocated to Stabex in the Lomè III
16. Lomè II Articles 47,48
17. Lomè III Article 49
18. Lomè II Articles 38,43
19. Lomè III Article 45
20. Lomè III Article 194
21. See Framework Agreement of July 6th, 1976 for commercial and economic cooperation between the EEC and Canada, OJ L260/2 1976; Agreement of June 23rd, 1981 for commercial and economic cooperation between the EEC and India, OJ L328/6 1981; Framework Agreement of September 19th, 1980 for cooperation between the EEC and the Federal Republic of Brazil, OJ L281/2 1982
22. Jing Ji Ri Bao (Economic Daily) May 21st, 1988. See also China-Britain Trade Review May 1989, p5

23. Ibid
24. Ibid
25. Bull EC 3-1987 point 2.1.44 and 3-1988 point 2.2.40
26. Beijing Review Vol 31, No 13 (1988) p30
27. Ibid
28. This conclusion is evident after the European Parliament expressed its concern over incidents and human rights issues in Tibet in 1988 and 1989, and especially after the Beijing Event in June, 1989. The Madrid Summit in June 1989 has slowed down the pace of economic cooperation between the two parties. On 15th September, 1989 the European Parliament called for further slowing down of such cooperation.
29. Article 12(1)
30. The Law of the PRC on Chinese-Foreign Joint Ventures. Adopted by the Second Session of the Fifth National People's Congress on July 1st, 1979 and promulgated on and effective as at July 8th, 1979. See China's Foreign Economic Legislation Vol 1, Foreign Languages Press, Beijing
31. These laws and regulations include Chinese-Foreign Joint Venture Law (equity) 1979); Contractual Joint Venture Law (1988); Patent Law (1985); Trademark Law (1982); Foreign Economic Law (1985) etc
32. People's Daily (overseas edition) April 24th, 1989
33. Ibid
34. 1979-1984 major investors in China

	Amount of Investment (US\$ million)
Hong Kong and Macao	649.5
Japan	115.8
USA	102.5
EEC	75.6

Sources: Almanac of China's Foreign Economic Relations and Trade, 1984 and 1985, MOFERT, Beijing

35. In 1986, for example, imports of high technology and equipment from the EC account for 51 per cent. of China's total imports of high technology and equipment. People's Daily, 31st March, 1989.

36. European Community Investment in China 1979-1987 (US\$ million)

	Number of projects	Total sum invested	% EC total
Belgium	4	48	3
Denmark	9	41	3
W. Germany	32	286	20
Spain	5	200	14
of which offshore	(3)	(10)	
France	41	332	24
of which offshore	(3)	(208)	
Italy	20	102	7
of which offshore	(1)	(30)	
Netherlands	9	3	0.02
UK	46	394	28
of which offshore	(13)	(275)	
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Total	167	1,406	
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Sources: MOFERT. See China-Britain Trade Review January 1989, p13

37. China's intention of strengthening economic relations with the Community can be evidenced on various occasions, eg, Zheng To-Bing, Minister of the MOFERT; China emphasises trade and economic relations with the EEC. See People's Daily 7th June, 1986. Tong Zon, China strengthens trade and economic cooperation with the EEC. Ta-Gung-Pao (Hong Kong) 24th June, 1988
38. OJ C127/120 14.5.1985
39. For example, the investment agreements between the UK and the Philippines, Lesotho, Malaysia and Jordan etc. see Cmnds. 8148, 8246, 8269 and 7945 respectively.
40. Investment agreements between China and the Member States of the EEC

FRG	Agreement on Investment Promotion and Protection	7.10.83
France	Agreement concerning encouragement and reciprocal protection of investment	30.5.84
Belgium/ Luxemburg	"	4.6.84
Italy	"	3.12.84
Denmark	"	29.4.85
Holland	"	17.6.85
UK	"	15.5.86

Sources: State Council's Gazettes - various volumes

41. Article 12(2)
42. eg, Article 3(3) of the China-Belgium/Luxembourg Treaty
Article 3(2) of the China-France Treaty and
Article 3(1)(2)(3) of the China-UK Treaty
43. eg, Treaty between China and Germany
44. eg, Article 5 of the China-UK Treaty, Article 4 of the
China-Belgium/Luxembourg Treaty and Article 4(2) of the
China-France Treaty
45. Treaty between China and Germany
46. Treaty between China and France
47. Article 12(5) of the China-Belgium/Luxembourg Treaty
48. Treaties between China and the UK, China and France and China and
Germany
49. Article 5 of the China-Belgium/Luxembourg Treaty
Article 5 of the China-France Treaty
50. Article 6(2) of the China-UK Treaty
51. The period of time is within six months of the date on which the
dispute arose in the case of the China-France Treaty
52. Article 9 of the China-UK Treaty
53. Article 12
54. Supra 36
55. Speech of Zhao Weichen, Vice-Minister of the State Economic
Commission at the second EEC-China business week, Brussels
December 2nd-6th, 1985. Also see Bull Ec 3-1987 point 2.2.24.
See also supra 34A
56. See supra 34. The Commission and the Chinese authority organised
various symposia on trade with and investment in China to tackle
the problem
57. OJ L260/2 1976
58. Agreement of July 19th, 1961, establishing an association between
the EEC and Greece, for example JO 1963, 294
59. Ibid
60. Ibid

61. Detailed discussion of mixed agreement. See O'Keelf and Schemery ed: Mixed Agreement, 1983
62. Article 18 of Commercial Cooperation Agreement between the EEC and Israel in 1975 which was replaced by a Protocol in 1978
63. Supra 57
64. Supra 21
65. Supra 21
66. Agreement for commercial, economic and development between the EEC and the Islamic Republic of Pakistan OJ 1986 L108/1
67. Cooperation Agreement of March 7th, 1980 between the EEC and Indonesia, Malaysia, the Philippines, Singapore and Thailand - member countries of the Association of the South-East Asian Nations OJ 1980 L143/2
68. Supra 64, 65, 66 and 67
69. eg, Memorandum between China and UK on Technical Cooperation on Agriculture, Fishery and Food Processing in November 1980 27
Compilation of Treaties and Agreements of the PRC (1980) p249
70. OJ L74/292, July 22nd, 1974
71. Preamble of Council Decision No 74/393 of July 22nd, 1974
72. Article 1
73. Article 3
74. European Parliament Working Document 76/77 p19
75. Ibid p95
76. OJ 1977 C No 219, Debates of the European Parliament
77. The Declaration of the Third Session of the Chinese Communist Party Eleventh Congress, People's Daily 8.12.1978
78. Interviews with officials of the Commission of the European Community

79. Economic Cooperation Agreements between China and the Member States of the EEC concluded 1978-1980

France	Long-term Agreement on Developing Economic Relations and Cooperation	4.12.78
UK	Economic Cooperation Agreement	4.3.79
Italy	"	23.4.79
Denmark	Economic and Technical Cooperation Agreement	14.9.79
FRG	Economic Cooperation Agreement	24.10.79
Belgium/ Luxembourg	Cooperation Agreement on Economic Industry Science and Technology	23.11.79
Holland	Economic Cooperation Agreement	30.10.80

Sources: Compilation of Treaties and Agreements of the PRC,
vols 25, 26 and 27

80. Various new agreements have been concluded between China and the Member States of the EEC

81. Article 14

CHAPTER VII

EEC ANTI-DUMPING LAW RELATING TO IMPORTS FROM CHINA

- A. Community Rules on Anti-Dumping
- B. An Initial Analysis of Proceedings against Imports from China
- C. Anti-Dumping Law and Practices of the European Community Relating to Imports from China
- D. Remedies against Community Anti-Dumping Measures taken in respect of China
- E. Alternatives?

CHAPTER VII

EEC ANTI-DUMPING LAW RELATING TO IMPORTS FROM CHINA

There are twenty four anti-dumping proceedings against China which have been published in the Official Journal till the end of 1988. China has become one of the major targets of the EEC anti-dumping law since 1979¹. The first case occurred in 1979 concerning products of saccharin and its salts². From 1981 about 5 to 10 per cent EEC anti-dumping proceedings every year are against Chinese exporters although imports from China are only about 1 per cent. of its total imports. The Community's anti-dumping rules play an important role in trading with China³. It is predictable that more and more anti-dumping proceedings will involve China's exports since trade between China and the Community has increased substantially, and will continue to increase; more importantly, because of China's special economic situation and the Community's current regulations. This Chapter will examine the EC antidumping rules relating to imports from China. It is necessary to note that because China is classified as an NME, the rules relating to it are very much the same as the rules relating to all other NME countries in general. The arguments in this Chapter are, therefore, focused on rules relating to NME in general.

A. Community Rules on Anti-Dumping

Since the first EEC anti-dumping regulation was enacted in 1968⁴, the Community's anti-dumping rules have undergone various amendments to correspond with the changing situations⁵. The current rules are set out in a new Council Regulation (EEC) No 2423/88 of 11th July, 1988⁶, to reflect the latest developments and changes. The Community's anti-dumping rules are said to be among the most liberal in the world, and it is fully in line with the GATT rules⁷. However, doubts may arise as the Community may have given a too arbitrary interpretation of the GATT rules, and the GATT anti-dumping rules themselves may also be challenged.

Under the GATT rules, a product is considered to be dumped if its export price is lower than its normal value⁸. The Community regulation follows the GATT rules and provides that the basis for assessing the normal value and the export price depends on the particular situation obtaining in the country of origin or export and the importing country⁹. Normal value may be based on the domestic price in the country of origin or export¹⁰, or the supplier's export price to a third country¹¹, or the costs of production in the country of origin¹², or where the goods are from a State-trading country, the normal value may be established by reference to the price or cost of similar goods in a comparable free market economy country¹³. Similarly, the export price may be the exporter's price to the importer or it may be that derived from the price of the importer's first independent sale in the importing country¹⁴. Thus, as Dr

Beseler rightly pointed out: "dumping in the legal sense is essentially a collective term for a variety of practices."¹⁵

In addition to the fact of dumping, relief is predicated upon proof that the alleged dumping is causing or threatening to cause material injury to a "Community industry" and that the proposed relief is in the "Community interest"¹⁶. The injury at issue must be suffered by an industry as a whole [or a major part of it] and must be material¹⁷. Among the criteria relevant to establish the necessary injury are loss of share of the Community market due to imports, unemployment, short working time, depression of price in the Community market, loss of profits and low rate of capacity utilisation¹⁸. "Industry" is not broadly defined and is normally taken to be the narrowest sector of production which can be identified¹⁹. The "Community industry" is normally taken to be either all the manufacturers of the product in question or those who account for a major proportion of the Community production²⁰. This is notwithstanding that they may be concentrated into a small geographical area. "Community interest" covers a wide range of factors including the interests of consumers and processors and the competitive situation within the Common Market²¹.

Any application will normally require the support of a major part of the industry²². The Commission carries out a preliminary examination in order to determine whether a prima facie case has been established, whereupon a full investigation of the complaint may take place²³. In order to prevent material injury being caused to an

industry while the full investigation is in progress, the Commission may implement provisional action against allegedly dumped imports. This takes the form of a provisional anti-dumping duty which is imposed by a Community regulation²⁴. In the event that the investigation establishes dumping, the amount of duty ultimately collected shall not exceed the margin of dumping finally established²⁵. An investigation may be terminated where the foreign supplier undertakes to implement measures to eliminate the margin of dumping or the injurious effects caused thereby²⁶.

The "ratio legis" of the Community's anti-dumping legislation and the GATT anti-dumping rules has been discussed for a long time. Dr Beseler considers that it is one of the instruments of commercial defence which permit the general liberalisation of trade on a most favoured nation basis, as established by the GATT²⁷. However, others have argued that anti-dumping provisions have, in their implementation, become an impediment to international trade and a threat to the liberal trade order²⁸. It reasons as follows:-

- (a) The primary-injury standard applied in anti-dumping investigations is based on a protectionist diversion of business test rather than on anti-trust principles. Under this standard, injurious dumping may be found if domestic producers' sales are displaced by dumped imports, whatever the implication for the competitive health of the domestic industry.

- (b) The reasoned findings are often inconsistent, unpredictable and even capricious, thereby increasing the commercial uncertainties of those engaged in international trade.
- (c) The remedial measures applied are anomalous.
- (d) Anti-dumping proceedings represent a charge on public expenditure, while also imposing direct costs on those engaged in international trade²⁹.

The Community anti-dumping legislation also sets special rules to deal with imports from countries which have been categorised as State-trading countries. According to the Community regulations, because of the different economic systems and pricing systems, the concept of normal value is hardly relevant in these countries. In assessing the possible dumping, therefore, the Community employs a method of referring to a third market economy country in order to determine the normal value in these countries. Such an approach is even more problematic: it denies any possible comparative advantage, or any possible efficiency, in these countries. This issue will be discussed in more detail below.

**B. An Initial Analysis of Proceedings relating to
Imports from China**

Since 1979 China has constantly been the subject of several anti-dumping actions. In 1979 a total of twenty four investigations

were initiated, two of which concerned China. In 1980 one case out of fourteen concerned China. In 1981 two out of forty eight concerned China. In 1982 the number of investigations concerning China reached its highest level, four out of fifty eight cases against China. There were two in 1983, two in 1984, one in 1985 and two in 1986. In 1987 two proceedings were started against China, but in 1988 alone the number reached as high as six³⁰. There is a clear tendency towards an increase in dumping actions against China (see Table 1).

Table 1
Community proceedings of anti-dumping against imports from China

	1979	'80	'81	'82	'83	'84	'85	'86	'87	'88
Numbers of proceedings	2	1	2	4	2	2	1	2	2	6

Sources: Bull EC 1979-1988

The above numbers correspond to the increasing trade volume between the Community and China after the first bilateral trade agreement on the one hand³¹. On the other hand, it also reflects the Community's practice since the late 1970s of invoking of anti-dumping law as an instrument in protecting the Community industries more often than in previous years³². This is particularly true since very recently the Community has invoked more anti-dumping actions against developed and developing economies, particularly those of the Pacific Basin³³. It is reasonable to assume that this trend is likely to continue for the years to come against the background of forming a single market in 1992. For non-European firms, the low price of their products will be necessary in order to maintain their competitive position in the European market because of the reduction of the cost

of products within the Community, whereas the Community industry would like to be better protected under such circumstances. The result will inevitably be more anti-dumping complaints. The signs of the Community anti-dumping action point in the direction of a more protective and fortified Europe, not the opposite.

The commodities involved in these twenty nine proceedings consist principally of chemical products, (eighteen out of twenty four are chemical or allied products), four machinery products, one food and one hand tool (see Table 2).

Table 2
Commodity involved in anti-dumping proceedings

chemical products	machinery products	food	others
18	4	1	1

Sources: Bull EC 1979-1988, and various issues of Official Journal

It is worth noting that textile exports from China to the Community is the single largest volume of trade transaction between the two parties. China's rank has jumped from No 15 in 1978 to No 2 in 1985 among the Community's textile products suppliers³⁴. But there are no anti-dumping proceedings against Chinese exports involved in textile products so far. This is partly because the 1979 and 1984 textile arrangements have been followed well. Within the quota of the arrangement the Community has no necessity to start anti-dumping proceedings; and partly because, even if the quota is slightly exceeded somehow, a substantial part of the textile products from China consist of raw materials and semi-products according to the

arrangements³⁵, and these relatively low-priced raw materials are beneficial to the Community textile industry in competing with outside suppliers. In this regard the Community is reluctant to start anti-dumping proceedings. Yet there is another reason. The Textile Committee established under the Textile Agreement and its consultation arrangement within this Committee have effectively enabled the Community to resolve the problem without having to initiate anti-dumping proceedings³⁶. For other products, however, where there is no special arrangement like the Textile Agreement, the Community wants to protect its industries from severe competition through the commercial instruments of anti-dumping proceedings. Among others, chemical and machinery products are most often being the subject of EEC anti-dumping proceedings. Statistics show that chemical and allied products accounted for approximately 40 per cent. of the total EC anti-dumping proceedings during 1981, 1982 and 1984³⁷.

The relief of these proceedings is another interesting subject to discuss. Community law provides in accordance with Article 7 of the GATT Anti-Dumping Code that there is no need for the imposition of anti-dumping or countervailing duties when foreign exporters whose products are subject to an investigation render a reasonable price undertaking³⁸. This implies that the exporter will raise the export price in such a way as to either eliminate the dumping margin or to avoid injury or the threat of injury to the domestic industry. The European agencies have made frequent use of this alternative method of terminating investigations, quite in contrast to their US counterparts who have been more reluctant to settle cases amicably³⁹. In the

Commission's First Annual Report on the Community's Anti-Dumping and Anti-Subsidy Activities, the Commission stated that "the Community is impartial in its stance on the acceptance of price undertakings as an alternative to the imposition of duties. Indeed it is often found that undertakings prove to be more flexible than duties as a means of eliminating the injury caused by dumping or subsidisation."⁴⁰

According to Mr Dietmann, the number of investigations concluded by acceptance of a price undertaking is well over 50 per cent. of all cases⁴¹. It is a similar situation in the case of proceedings involving imports from China. Among twenty four investigations, eleven were terminated by acceptance of a price undertaking, two were subject to provisional duties, another seven were subject to definitive duties, two were found no injury and five are pending⁴² (Table 3)

Table 3
Relief of Proceedings

undertakings	definitive duties	provisional duties	no injury	pending
11	7	2	2	5

Source: Bull EC 1979-88, Beseler & Williams p263

Some commentators argued about the advantages and disadvantages of terminating investigations through acceptance of a price undertaking by the exporter⁴³. The question seems to be more an economic issue rather than a legal one. However, what seems to be of more interest to a lawyer is the question whether the forms of undertaking include quotas for selling to the Common Market by the

specific exporters. In Article 10(2) of the Council Regulation (EEC) No 2423/88, undertakings are defined as "prices are revised or exports cease to the extent that the Commission is satisfied that either the dumping margin or the amount of the subsidy, or the injurious effects thereof, are eliminated."⁴⁴ Dr Beseler interprets the words "cease to the extent..." as allowing of the Community to accept undertakings by which quantities are limited²⁵. Actually, there was a case terminated by limiting exports to the Community²⁶. In my view, it is unlikely the intention of Regulation (EEC) No 2423/88, to contemplate the possibility of limiting quantities. Rather, the imposition of a quota arrangement at the Community level is normally governed by other regulations - Regulation No 288/82 in the case of imports from non-socialist countries, Regulation No 1765/82 in the case of imports from most socialist countries, and Regulation No 1766/82 in the case of imports from China. So when the Commission considers the acceptance of undertakings of limitation exports, it should not mix the anti-dumping proceeding with the quota arrangement in any way, only in exceptional circumstances where the exporter clearly prefers to limit his exports rather than increase his prices, the limitation of exports arrangement may be accepted.

**C. Law and Practice of the EC Anti-Dumping Proceeding
against Imports from China**

The very crucial element in determining whether sellings in the Community market have been dumped is the determination of normal

value, that is specially true if the proceeding involves imports from non-market economy countries. Under normal circumstances, it is the Commission's practice to base the normal value on the domestic price of the exporting country, or price of export to a third country, or the constructed value adding cost of the product and a reasonable margin of profit⁴⁷. Whereas in dealing with imports from alleged non-market economy countries including China, the Community, in common with the United States, determines the normal value, not based on the domestic price of the country concerned, but on the price of a like product in an analogue third market economy⁴⁸. This is the main difference in the rules applied to market and non-market economies and affects the whole basis of the comparison of prices which is at the heart of an anti-dumping investigation. This difference is, therefore, extremely significant in the Community anti-dumping rules against China.

Community legislation provides that, in the case of imports from State-trading countries, the normal value shall be based in an appropriate and not unreasonable manner on one of the following criteria:-

- (a) the domestic or export price of the like product in a third market economy country;
- (b) the constructed value of the like product in a third market economy country; and

- (c) if neither of the above criteria provides an adequate basis, the price paid for the product in the Community, adjusted where necessary, to include a reasonable margin of profit⁴⁹.

The following part of the Chapter will discuss the main legal problems in EC anti-dumping rules relating to imports from China.

1. Non-market economy country

The European Community applies special rules to determine if exports from non-market economies (China is classified as one of them) have been dumped in the Community market. There is no published official explanation about it⁵⁰. But the principal rationale of the Community in establishing two separate sets of rules for determining normal value is that actual prices or even constructed values in a non-market economy country cannot be fairly compared with export prices to the EEC⁵¹. The main justifications for using special rules are:

- (a) that the monopoly of the State over foreign trade distorts export prices;
- (b) that a domestic market price cannot be identified in a non-market economy whose domestic economy is managed by the State rather by the principle of the free market;

- (c) that costs of production are distorted in a non-market economy;
and
- (d) that the non-convertibility of domestic currency makes a
comparison of domestic price and export price unreliable⁵².

The justification may bear merits to the extent that the traditional centrally planned economy in China and most Eastern European countries do make the determination of normal value difficult and unreliable. However, the EC Anti-dumping Regulation and its underlying justifications have so far failed to give a definition of a non-market economy, nor has it set any clear detailed criterion of a non-market economy. Consequently, the EC has wide discretion in applying the Regulation in a rigid, or even arbitrary, manner.

By virtue of Article 2(5) of the Anti-dumping Regulation, the Commission will treat China as a non-market economy for dumping purposes. As discussed in Chapter II, the concept of a non-market economy is not an accurate one in describing the economic system in China any more. Since economic reform, the State monopoly over foreign trade in China has been, to a certain extent, dismantled. The economy is regulated both by the State plan and market forces, with a tendency for the latter to play an increasingly important role. Alongside the State-set price, a free market price is also available. The Community Anti-dumping Regulation has also failed to provide any facility for applying market economy rules on a sectional or regional basis, yet the development of special economic zones in China raises

important questions as to their economic status. It is alleged that market forces play a dominant role in the economy of these special economic zones⁵³. The issue of the post-1997 status of Hong Kong, which at the moment is treated as a free market economy and will become a special administrative region of China when the time comes, perhaps underlines the nature of the problem⁵⁴. Furthermore, the Community's method of deciding non-market economy ("NME") has further deepened the problem. In deciding which country is an NME, the Community simply produced a list of countries without any justification or explanation. This approach of enumeration has the advantage of relieving the Commission of the burden of having to determine in each case whether it regards the country involved to be an NME. However, such an approach gives no criteria as to why a country qualifies as an NME (or State-trading country), and lacks a careful analysis of a particular economy. The party in question does not even have a chance to contest or discuss in such circumstances. Moreover, such an approach is less flexible and less adaptable in reflecting changes in the economic structure and system of the country concerned. "This is a disincentive to more liberalised non-market economies to bring their trade policies into line with Western capitalist ideas since they have no idea what behaviour placed them on the list in the first place."⁵⁵ This is particularly true in the case of China. As argued in Chapter II, the failure of recognising China's changes in its economic structure on the EEC's part not only discourages trade and economic relations between China and the EEC, but may also discourage China's further development towards a more market-orientated economy.

Unlike the EEC, the US has an open-ended definition as to what qualifies as an NME, ie:

- (a) the degree of government ownership of the means of production;
- (b) the degree of centralised government control over allocation of resources;
- (c) the degree of centralised government control over outputs; and
- (d) relative convertibility of the country's currency and the degree of government control over imports⁵⁶.

Neither the United States law, nor the Commerce regulation enumerates the countries or the economies of which are considered to be State-controlled for the purposes of law. Instead, the character of the economy of the country from which the imports under investigation are exported, is determined on a case-by-case basis⁵⁷.

To be fair and less discriminatory, the EC should discard the unrealistic concept of NME (or State-trading country) in trading with China, and repeal the special rules against it. This is also in line with the GATT Anti-dumping Code which requires the developed countries to give special regard to the special situation of developing countries when considering applications of anti-dumping measures under the Code⁵⁸.

If this proves to give rise to endless debates and a long process of legislation, the first step the EC could take is to change its enumerate approach, and give an objective criteria of NME, as its US counterpart has done, and to make it possible of applying market economy rules on a sectional or regional basis.

2. The Choice of Analogue Country

The selection of an analogue country is an extremely important factor of the dumping process in cases concerning non-market economies. This is so both for the complainant industry and for the non-market economy. A dumping action aims to show that the domestic price of a product in the country of export is greater than its export price. Therefore, the complainant industry will seek to identify an analogue country with a domestic price as high as possible. It will be vital for the non-market economy to obtain the selection of an analogue country with a domestic price as low as possible. Accordingly, the selection of an analogue country is likely to be the subject of strong argument on both sides.

2.1 Guidelines in the Anti-dumping Regulation

In the selection of an analogue country there are hardly any guideline in the Community Regulation of No 2423/88, except a general obligation on the Commission in Article 2(5) of the Regulation to determine normal value "in an appropriate and not unreasonable manner".⁵⁹ This leaves a great deal of discretion to the Commission.

The administrative discretion of the Commission, therefore, plays a critical role in choosing an analogue country.

According to the Community legislation the complainant industry must submit evidence to prove that the selling by the NME country producer or exporter in the Common Market is dumped and injuries are caused. In practice, the complainant has the initiative right, therefore, to choose the analogue country. They will not, of course, choose a country which is not favourable to them in the finding of dumping. It is the burden of exporters, whose exports are allegedly dumped, or the importer concerned, to prove the "inappropriateness and unreasonableness" of the selection. Thus, in a proceeding on imports of barium chloride from China, the complainant had suggested the United States of America as the analogue market economy country to determine the normal value⁶⁰. The main importer of the product concerned objected to this suggestion on the grounds that the American producer is the only manufacturer of the product concerned in that country. This manufacturer, therefore, benefits from a monopoly position enabling him to impose upon his customers prices which are higher than prices resulting from normal market conditions. The Commission then concluded that the evidence to support the above argument was not sufficient and it would be appropriate and not unreasonable to determine normal value on the basis of the domestic price in the United States of America⁶¹.

The Anti-dumping Regulations, however, do not limit the choice of the analogue country being suggested by the complainant only. In a

number of cases, the Commission accepted the other interested party's suggestion to choose another analogue country⁶². In some cases neither the complainant's suggestion nor the exporter's choice are accepted by the Commission in deciding an analogue country. The Commission may itself choose an "appropriate and not unreasonable" one⁶³.

2.2 Guideline in the Practice

Although there is hardly any guideline in the Anti-dumping Regulations for the selection of an analogue country, in practice, however, the Commission almost always provides a rationale for its selection. After examining these rationales put forward by the Commission, we may find that the Commission's choice of analogue country is dictated by a number of factors including:

- (i) the structure of the manufacturing process; the Commission will usually look to see whether the proposed analogue country and the non-market economy country concerned have similar production processes in the relevant industry or whether the scales of production in the two countries are comparable;
- (ii) the competitiveness of the market, as evidenced by a level of internal competition sufficient to ensure that price levels are in a reasonable proportion to production costs and the absence of price controls in the analogue country.

However, the lack of competition is not always fatal and sometimes the Commission will pay particular attention to the relationship between price and cost. This was the case with Natural Magnesite (both caustic and dead burned) where Spain was selected as an analogue country notwithstanding the fact that there was only one Spanish producer⁶⁴.

In the case of both non-market and market economy countries who are accused of dumping, it is the Commission's practice to use one of the market economy countries accused of dumping as an analogue for the NME country since this would reduce the need for investigation and inspection of another potential analogue. In the Hardboard case, for example, the Commission was faced with a complaint of dumping involving ten countries, including market economy countries. In choosing the analogue the Commission rejected the suggestion of choosing Austria as an analogue country because it had not been accused of dumping⁶⁵.

The Commission is also concerned that the situation might arise whereby it may not be able to receive any information from the analogue country. In the Russian Watches case, the Commission had to reject Switzerland as a potential analogue country since, under Swiss law, Commission officials could not inspect Swiss manufacturers' premises⁶⁶. This criterion has also been used in the Chinese Artificial Corundum case⁶⁷. The willingness of countries to participate in Commission investigations is well accepted. But in at least one case in the United States, information supplied by a Finnish

producer, as an analogue to help the International Trade Administration to substantiate a claim of dumping from an NME was used against that analogue country in a later dumping action against it⁶⁸. This has caused a marked reluctance on the part of free-market producers to supply information to the ITA. It is also precarious to see whether the same would happen in the EEC context, since the co-operation of potential analogues is an important element in the Community's anti-dumping policy towards NMEs.

2.3 Inattention of Development Level

The choice of an analogue country is a highly flexible matter. The degree of similarity varies from case to case. The Commission has used a number of countries at various stages of economic development, such as India, Sri Lanka, Spain, Norway, Japan and the United States, as analogue countries in dumping actions against China⁶⁹. A notable tendency in most cases has been that the analogue country chosen has been one with a much higher level of economic development, and therefore of GNP, in excess of that of China. As a result, a positive finding of dumping is more likely.

It is important to note that comparative levels of economic development between the non-market economy and the analogue country have not, in contradistinction to the position in the US, been considered as significant in the Commission's choice of an analogue country. In the United States, "the third country is chosen in a manner designed to give as fair a comparison as possible"⁷⁰. It is

explained that the fairness is to be that "the initial choice is made on the basis of considering non-state controlled economy countries, both in the same geographical area as the non-market country and at a closely approximating economic development level."⁷¹ The reasons are that if the raw materials are from the same approximate geological or geographical area or semi-finished materials from the same approximate industrial area, accordingly the costs are likely to be similar, excluding the differences in the economies; and if two countries are at approximately the same industrial level, their overall costs are more likely to be similar⁷². This test was incorporated into the US Regulation⁷³.

It is criticised by the Commission officials for the lack of factual evidence and rationale⁷⁴. Dr Beseler also poses the question on "no reliable indication of the level of economic development, and a comparison with prices or costs from countries with a similar level of development is frequently neither practicable nor appropriate since like products may not be produced in the comparable market economy country; or price or cost data may not be available there; or they may reflect sales at a loss, dumping or subsidy."⁷⁵

However, one Advocate General of the European Court of Justice has pointed out in Timex case that this factor is one of the characteristics to be considered in determining the analogue country, on a par with the competitiveness of the market and the structure of the manufacturing process⁷⁶. In his opinion, A-G Darmon stated that "when applying Art. 2(5) the institutions have a wide discretion as

regards the characteristics to be considered in determining the analogue country. In this regard they apply criteria based not only on the similarity of the product, an indispensable requirement, but also on the level of development, the competitiveness of the market and the structure of the manufacturing process in the country in question. That practice, which enables the analogy to be narrowed down, is in keeping with the aim of determining normal value in an 'appropriate and not unreasonable' manner"⁷⁷.

Following this statement of the Advocate General of the Court, the Commission, in *Roller Chairs for Cycles*, supported its choice of analogue country over that chosen by the defendant on the basis that its level of development was closer to that of the non-market economy in question⁷⁸.

2.4 Problems related to the Choice of Analogue

The approach of using the price of an analogue country poses a number of difficult problems for the Chinese producer.

First, the outcome of the process of selection of an analogue country is unpredictable. The inability to predict accurately the choice of an analogue can be damaging in the commercial field where certainty is of paramount importance. Two American lawyers criticised such a system: it is not fair nor is it commercial reasonable to expect an NME producer to be familiar with the home market price of a similar product in Finland or Paraguay or some other country which

Commerce may decide ex post facto is the appropriate surrogate. It is even less reasonable to expect him to know the cost of production of a similar product in some unidentified third country. Such a system "is expecting the NME producer not only to know his produce's price around the world but also to keep track of all of the prices of the inputs in the production around the world. This uncertainty of methodology is a trade barrier in and of itself"⁷⁹.

Secondly, and closely related to the above problem, if the NME has no indication of which country will be used as the analogue in a potential anti-dumping dispute, it will not know how to adopt its pricing structure to avoid such a charge⁸⁰. A free-market producer knows that if his export price is lower than the domestic price of the same product, he will be open to a charge of dumping where the other conditions obtain. It is open to him either to raise his export price or lower his domestic price to eliminate a dumping margin. However, this option is not open to the NME producer since under no circumstances can the domestic price be utilised; the market strategy of an analogue country will be beyond the influence of the NME member⁸¹.

Thirdly, for reasons of confidentiality, the data obtained from the analogue country will not be disclosed to the Chinese producer. As a result he will not be able to check its reliability. Experience has shown that problems may be encountered in obtaining the permission of the analogue State to investigate the analogue producer, and, even where granted, difficulties may be encountered in obtaining the

co-operation of such producers. It must be noted, in this respect, that the analogue producers will by definition be in competition with the Chinese producer either in the EEC or in other export markets. There will be an adverse interest in the outcome of the case between them. Consequently, the information on the pricing structure supplied by the analogue producer may not be complete or even trustworthy⁸². The analogue producer may also have other private reasons (apart from inconvenience) for not wishing to disclose fully what is often sensitive business information to a State authority.

Finally, the NME also suffers from the fact that if it wishes to counter the dumping accusation, it will need to attach the determination of the normal value of the analogue producer's product, arguing that it is inappropriate. To do this it will need accurate information from the analogue producer on its pricing structure. As discussed above, whether the analogue producer will be willing to provide reliable information is very doubtful indeed. Even if the NME producer does get accurate information from the analogue country, this will relate to past pricing behaviour only and will not be able to influence the pricing decisions of the NME producer so as to avoid an anti-dumping action in the first place. The retroactive nature of this information only gives the NME producers at most an opportunity to counter actions already brought.

2.5 Normal Value in the Analogue Country

There are a number of methods for deciding normal value in an analogue country. According to the Anti-dumping Regulation, the Commission may either:

- (a) select the domestic price of the analogue country, or an export price to another country, including to the Community; or
- (b) construct a value; or
- (c) If neither (a) nor (b) provide an adequate basis, select the Community price.

In common with its usual approach to cases involving imports from non-market economy countries, the Commission has, in cases involving the PRC, tended to base normal value on the domestic price of the analogue country. Export price, used where the domestic price was considered unreliable either because of the special nature of the domestic market or because a significant amount of domestic production was exported, has been used only three times in cases involving the PRC⁸³.

Constructed value has been used where the domestic price in the analogue country is considered unreliable either because of protection of the domestic product or because the domestic price is considered not to cover all the costs of production. This has been used in three

cases against the PRC⁸⁴. The constructed value will include: (a) production costs and selling and general administrative expenses; and (b) reasonable profit.

The use of a Community price, to be taken only as a last resort has, in fact, never been used.

3. Export Price and the Dumping Findings

Not merely the determination of normal value is the crucial element towards a dumping finding, but the way the Commission calculates the export price and the comparison between the normal value and the export price is also an important element in anti-dumping proceedings.

Article 2(13) of Regulation No 2423/88 provides that where prices vary, "export prices shall normally be compared with the normal value on a transaction-by-transaction basis except where the use of weighted averages would not materially affect the results of the investigation." And Article 2(14)(b) provides that "where dumping margins vary, weighted averages may be established." In Ball Bearing II (Japan and Singapore), the Commission used the transaction-by-transaction method to calculate the export price and weighted average method to determine the normal value. The different methods employed by the Commission were challenged by the exporters in front of the European Court⁸⁵. According to the exporters, the possibility of choosing between various methods of calculating the dumping margin

specified by the EEC Regulation had to be reconciled with Article 2(9) of the Regulation, which required that the normal value and the export price should be calculated according to the same method so that a fair comparison might be made. The Japanese exporters further claimed that the result of the transaction-by-transaction method of assessing the export price applied by the contested regulation was that only sales at dumping prices were taken into account, while those at prices above the normal value were disregarded. The method adopted therefore inevitably led to a finding of dumping and to the establishment of a dumping margin which had no connection with reality⁸⁶.

The Court recently rejected the claim. It held that Article 2(13)(b) and (c) of Regulation No 3017/79 merely stated the various possibilities for calculating the dumping margin without imposing any obligation that the methods chosen for calculating the normal value and the export price should be similar or identical. It further held that Article 2(9) of the Regulation did not require the normal value and the export price to be calculated according to the same method. As far as the transaction-by-transaction method is concerned, it did not, in the Court's view, exclude from the calculation of the dumping margin transactions at prices above the normal value, but included them in the calculation of the weighted average of all the prices charged on the export market. Furthermore, the Court concluded that "the transaction-by-transaction method was the only method capable of dealing with certain manoeuvres in which dumping was disguised by practising different prices, some above the normal value and some below it"⁸⁷. "The application of the weighted average method in such

a situation would not meet the purpose of the anti-dumping proceeding since that method would in essence mask sales at dumping price, by those at what were known as "negative" price, and would thus in no way eliminate the injury suffered by the Community industry concerned."⁸⁸

The case, as it can be seen, only dealt with technical problems to explain the provisions of the Regulation 3017/79 which determines the way of calculation of anti-dumping duties. The legal consequences, however, should be by no means underestimated. In the first place, the severe attitude taken by other European Institutes in dealing with anti-dumping proceedings is now confirmed by the Court. The European Institutions, therefore, are further solidified in front of alleged dumping of imports. Secondly, it is clear from the judgment that the European Community anti-dumping laws are aimed to protect the industry of the European Community, rather than to liberate international trade; and it becomes an important instrument of eliminating "the injury suffered by the European industry concerned."⁸⁹ Thirdly, it is also clear from the Court decision that not merely the way of determining the normal value, but also the way of determining the export price and the way of making comparisons are very important in a dumping finding.

4. Adjustment

The newly amended Regulation contains an exhaustive list of the factors which may be taken into account when adjusting the normal

value of the analogue country and the export price of the NME country so as to make a fair comparison. They are:

- (a) physical characteristics;
- (b) import charges and indirect taxes;
- (c) selling expenses resulting from sales made at different levels of trade, or in different quantities, or under different conditions and terms of sale.

The issue of adjusting has always been a contentious one in practice. Strong argument is often required as to whether each of these factors should be taken into account in the Commission's decision.

4.1 Physical Characteristics

The question of similarity of physical characteristics is closely related to the "like" nature of the analogue product (Article 2(12)). A particular difficulty arises where the quality of the products is different. The inferior quality of some products from NME, particularly China (as a developing economy) is often recognised, for example, in barter-trade arrangements. Such a difference has occasionally been recognised by the Commission, for example, in the case of Upright Pianos from Russia. In this case the Commission made a downward adjustment to the piano prices of the analogue country (Finland) to account for the inferior quality of the pianos from the USSR⁹⁰. The Commission takes a restrictive attitude towards the

claims involving the different qualities of the products. It has so far generally refused any downward adjustment to the normal value of the analogue country for reasons of cost advantage enjoyed in a particular case by a NME country. In the Natural Magnesite from China and North Korea proceedings, the Commission found that products with lower quality sold on a third market economy country could make no difference in the sales price, and there is no difference in the cost of production of these two qualities⁹¹. When the interested parties claim such an allowance, they must present the evidence. Without the evidence the Community will not consider giving any adjustment⁹².

Products from China are often of different levels of quality to those from an analogue market economy country. If the Commission does not take account of these differences and make appropriate adjustments accordingly, the Chinese products are more likely to be subject to anti-dumping duties as the finding of dumping of their products is more likely.

4.2 Comparative Advantage and NME

Another interesting issue is whether adjustment should be made to the analogue country's prices or costs to reflect any comparative advantage held by the producer in the non-market economy country. The issue is interesting because it involves the whole idea of to what extent trade relations and economic co-operation between the Western world and a socialist country can be conducted and what sort of arrangements should be made in respect of such relations.

It is the Community's practice that such an adjustment shall not be made. In the case of Natural Magnesite Caustic-Burned originating in China, it has been argued that the ore used for Chinese production has an exceptionally high raw magnesite content, and much less processing is needed for using this material, thereby giving these producers an exceptional natural competitive advantage as compared to producers in an analogue country⁹³. The Commission initially replied that it was difficult for the Community to establish whether any natural comparative advantage existed in China, and if so, how normal value should reflect such advantage, if the same conditions existed in the market economy country used for establishing normal value. It was, therefore, unable to decide whether this factor should be taken into account, and it would continue to examine the question of whether such an adjustment should be made⁹⁴. The Commission decided later that adjustments of the normal value could not be made since it was uncertain how these advantages, if they really existed and were not counterbalanced by competitive disadvantages, would be reflected in the normal value if the same conditions existed in the market economy country, as prices were not only a function of costs, but also of demand. More importantly, the Commission argued that if normal value were to be based on constructed value in a market economy country, any adjustment of costs established in a market economy non-member country to take account of alleged natural advantages would involve relying on costs and resource allocations in a non-market economy country, which Article 2(5) of Regulation (EEC) No 3017/79 was specifically designed to exclude⁹⁵.

The same reasons were used in deciding to give no adjustment of alleged cost advantages to the raw materials in the proceedings of Barium Chloride importing from China⁹⁶.

It is clear that the Commission follows the view expressed in 1973 by the British judge, Mr Justice Ackner, in Leopold Lazarus Limited v Secretary of State for Trade and Industry, concerning an anti-dumping investigation involving imports of pig iron from the GDR. In that case the judge stated that:-

"The fair market price cannot be determined by taking the price at which identical or comparable goods are being sold in the ordinary course of trade in the domestic market of the State-trading country. The Minister must look for the price of identical or comparable goods from another country. In doing so, he is not concerned with the conditions in the State-trading country or with their economics or mode of production, assuming contrary to the inherent probabilities, that he could ever have a true or balanced picture"⁹⁷.

This view is further theorised by Dr Beseler. He argued:-

- (a) The comparative advantages are not known with certainty and they may be more than offset by other comparative advantages enjoyed by the market economy producer. An advantage resulting from cheaper raw materials, for example, might be outweighed by advantages resulting from economies of scale or better production techniques in the market economy country.

- (b) Prices are determined by demand as well as supply. Where the normal value is based on prices in the market economy country, rather than costs, there is no way of knowing how any comparative advantage would be reflected in these prices; and
- (c) it would involve the need to rely on the methods and the costs of production in the State-trading country if any allowance for differences in comparative advantage is made, an exercise which the use of a third market economy country analogue is designed to avoid⁹⁸.

The Commission's view seems reasonable at first glimpse. It needs a great deal of work to be sure whether the alleged comparative advantage exists in the State-trading country concerned. Even if it does exist, it is even more difficult to find out whether those advantages are offset by other comparative disadvantages. To avoid all these troubles the Community simply does not take into account any alleged comparative advantage at all. The inevitable result of that is that products from alleged State-trading countries can never be sold at the lowest price in the Community market, now matter how low their actual costs, or how efficiently they might be produced, because the Community regulation requires the exporter of a State-trading country to charge a price in the Common Market at least as high as that of a producer in a market economy country, and no adjustment of comparative advantage, if any, will be taken into consideration. In such a way, the Community anti-dumping legislation has placed the

exporters from State-trading countries in a disadvantageous position in the competition.

Anti-dumping legislation of the EEC, and for that matter the USA, has a fundamental flaw based upon an inaccurate premise. The premise, stemming from a lack of understanding and a certain degree of prejudice, is that the NME producer cannot produce goods cheaper than the cheapest Western producer because it is inherently less efficient⁹⁹. This premise is highly hypothetical and in fact absurd. Countries such as China could have good reasons as to why they can produce goods more cheaply than a Western free-market producer, taking into consideration its low labour costs and rich natural resources.

Although these comparative advantages are obvious, they are irrelevant from the EEC's point of view, because the non-market economy system is irrational. Given the NME's pricing structure is unreliable or irrelevant to the Western concept of cost of production, value or price, there must be a substitution of the pricing structure of a comparable Western producer for that of the NME producer. Once the analogue producer has been identified, any comparative advantages enjoyed by the NME producer are irrelevant. It is only their bad luck, that NME producers adopt a basis of trade which is irrational and may prove to be unfair. The underlying implication is that if the Community's attitude to the NME is harsh, that is the fault of the system of the NME, not the Community or its rules. The anti-dumping rules of the EEC, therefore, pose a most straightforward discrimination against imports from the NME in general, and against

China in particular, as the latter is a developing economy. In this regard it may be concluded that the anti-dumping rules of the EEC have not only ignored the fundamental motive for international trade, ie, utilising comparative advantage, but also placed political consideration in a weighted position in its international trade law.

D. Community Remedies and Subsequent Action

The remedies applied by the European Community, generally, include an anti-dumping duty (provisional and definitive), and acceptance of undertaking. The Community, however, has preserved its freedom to impose quantitative restrictions or take other measures, rather than to impose dumping duties, on imports from countries which are not parties to the GATT by virtue of the "special measure" provision of Article 17(3) of the Anti-dumping Regulation. In the only case of this kind the special measure (QR) was taken against imports of certain nuts of iron or steel from Taiwan¹⁰⁰. Until China's membership of the GATT is settled, which is now under negotiation, it is always available to the Community to take special measures against the alleged dumping of products from China as long as the bilateral trade agreement is not compromised¹⁰¹.

1. Anti-dumping Duties

There are two sorts of anti-dumping duties; provisional anti-dumping duty and definitive anti-dumping duty. The provisional

duty is imposed for a limited period¹⁰²; once it is imposed, the release of the products concerned for free circulation in the Community will be conditional subject to the provision of security by the importer. The duty is not actually collected initially, but the importer must provide a guarantee that it will be paid if it is later decided that it should be collected. When the Commission has reached its final conclusions it makes a proposal to the Council which decides whether to impose a definitive duty and also whether to collect the provisional anti-dumping duty.

The level of duty shall not exceed the dumping margin established; and it shall be less if such duty would be adequate to remove the injury. The Commission requires the exporter's co-operation in the proceedings. If an exporting company has not co-operated with the Commission by completing the questionnaire and supplying such other information as required it may have to pay the highest duty (equal to the dumping margin). That was what happened in a number of cases involving Chinese exporters who never replied to any questions sent by the Commission. The Commission based its findings on the information available to it, and imposed the highest margin on the Chinese exporters¹⁰³.

Anti-dumping duty may be imposed in one of a number of ways, for example, by way of:

- (a) ad valorem duty, ie, a fixed percentage of the CIF prices before payment of customs duty;

- (b) specific duty, ie, a fixed amount per unit imported;
- (c) duty of an amount equal to the difference between the price at the Community frontier and a fixed price established by the Commission.

Ad valorem duty is the most common form of the duty.

2. Undertakings

As an alternative to duties, undertakings may be accepted from a company found to be dumping. These generally consist of a promise to the Community to increase prices to a specific level sufficient to eliminate either the dumping margin, or, (if less) the injurious effects of dumping. Because the undertakings given are confidential, the exact contents are never known to the public. However, in a recent proceeding, the Commission revealed that ⁽¹⁾price undertaking is not only binding on the export company, but also its subsidiaries, branches and agents; ⁽²⁾the undertaking also includes a promise that necessary steps would be taken to see that it is not circumvented by means of resale of the company's products from other countries; and ⁽³⁾the company shall report to the Commission periodically, giving details of quantities exported to the Community, unit price and total value¹⁰⁴.

As mentioned above, the Commission for some time has tended to accept more undertakings than to impose anti-dumping duties to

eliminate dumping. Recently, however, the Commission and the Council have been reluctant to accept undertakings, particularly where the product involved has been in politically sensitive, often relatively technologically advanced, areas. Their reasons for refusing undertakings have been that the undertakings may be difficult to monitor and may be easily evaded.

This may be particularly true in the case of undertakings offered by Chinese exporters, as in a number of recent cases Chinese exporters have been accused of breaching the undertakings. In the Roller Chains for Cycles and Potassium Permanganate cases, the Community withdrew the acceptance of undertakings offered by two Chinese exporters and imposed definitive duties on these imports from China¹⁰⁵.

3. Actions That May Be Taken By Chinese Exporters

Chinese exporters may take actions against measures taken by the Commission or the Council before the European Court of Justice. According to the Treaty of Rome, Chinese exporters are entitled to challenge under Article 173(2) the imposition of provisional or definitive anti-dumping duties against them. Also the case law of the Court of Justice shows that foreign exporters are entitled to challenge the imposition of provisional or definitive anti-dumping duties regardless of whether or not they are specially named in the challenged regulations, provided that they were concerned by the preparatory investigations¹⁰⁶. In Joined Cases 239/82 and 275/82 the Court ruled that "it is not excluded that the provisions [of

regulations imposing provisional or final anti-dumping duties] concern directly and individually those producers and exporters to whom are imputed the dumping practice." "It follows that the acts imposing anti-dumping duties are of such a nature that they concern directly and individually those producers and exporters who are able to show that they have been identified in the decisions of the Commission or the Council or concerned by the preparatory investigation."¹⁰⁷

China is classified as a State-trading country as far as the EC anti-dumping law is concerned, as if a proceeding involves Chinese exporters, any on-the-spot investigation will take place in other countries, either in Common Market countries, or in an analogue country. This does not exclude, however, the Chinese exporter from involving in the preparatory investigation. They must, if the proceeding involves their exports, reply to a standard questionnaire which the Commission sends out to them. If they do not reply, the Commission may make its preliminary or final findings "on the basis of the facts available"¹⁰⁸. In this respect the rulings in the Joined Cases 239/82 and 275/82 shall apply to them.

The independent importers may not directly challenge the imposition of anti-dumping duties in an action under Article 173(3) as the Court ruled in the Alusuisse case¹⁰⁹. They may challenge the contested anti-dumping measure in an action before national courts which may refer the matter to the European Court of Justice under Article 117¹¹⁰. In practice, as pointed out by a writer, national law and legal practice represents a considerable barrier to a private

individual who wishes to bring an action before the European Court of Justice under Article 177 of the EEC Treaty¹¹¹.

E. Alternatives?

It is widely discussed and well acknowledged that the concept of dumping is meaningless in the context of East-West trade¹¹². "In the first place, neither price discrimination nor below-cost pricing are measurable concepts within the East-West trade context. More importantly, even if they were, no reliable conclusions could be reached as to the likely permanence or temporariness of low-priced imports on the basis of such calculations."¹¹³ Furthermore, the use of the analogue country test in dealing with determination of normal value in non-market economy countries pre-empted comparative advantage in those countries. Imports from non-market economy countries are, therefore, put in a most disadvantageous position in competition in the Common Market. The use of the analogue country test also brings great uncertainty to the non-market economy exporters as they can never predict whether the price they charge for their exports have breached the trigger of the Community anti-dumping legislation, because they never know what country will be selected as the analogue country.

Dissatisfaction with the European Community anti-dumping rules, and indeed the GATT anti-dumping rules, has attracted numerous proposals for reform.

Instead of anti-dumping measures, Dr Dale suggested alternatives to handle the problems market economy countries may face with low-priced imports from a non-market economy country¹¹⁴. These alternatives include: (i) a reformed GATT Article XIX safeguard clause to the extent that protectionist action against low-priced imports from centrally-planned or market orientated economies is believed to be necessary, (ii) invoking the appropriate clauses in bilateral trade agreements, and (iii) if there must be anti-dumping laws, consideration might be given to replacing action against low-priced imports with measures aimed at penalising the ultimately excessive prices which, it is claimed, are the true target of anti-dumping action¹¹⁵.

Some trade lawyers have suggested that imports from planned economies should be limited to a fixed percentage annual increase.

A novel solution has recently been proposed by an American lawyer to use a "true exchange rate" test, ie, the administering authority in the USA chooses one source of exchange rates and makes that choice publicly available, producers in NME could apply that rate to their costs of production and be able to ascertain their minimum fair price for US sales. Similarly, US producers could estimate the NME producers' cost of production (as they do at present with market economy producers) and by applying this constructed exchange rate, ascertain the fairness of the NME sales which they are competing in the US market¹¹⁶.

These suggestions, as the results of examining current practice and intellectual thinking, bear merits in one way or another.

However, they also have some problems. As far as Dr Dale's proposal is concerned, there are some problems in his proposal waiting to be overcome:-

- (a) The anti-dumping practice has long been accepted by the international community and it has a legal basis in the GATT law system. If, according to Dr Dale, a reformed Article XIX machinery is used to the extent that the safeguard clause is selectively applicable to replace anti-dumping law, one might think that this is merely using one protective measure to replace another. There is hardly any difference between the two, and they are equally barriers to international trade.

- (b) A price clause in a bilateral trade agreement is a good solution in theory to prevent low-priced imports from State-trading countries. In practice, however, it does not always work. The trade agreement between the EEC and China concluded in 1978 and renewed in 1985, merely provided in Article 7 that "trade in goods and the provision of services between the two contracting parties shall be effected at market related prices and rates."¹¹⁷ A provision like that is too vague to provide effective protection. Any clause which goes further will be resisted by the countries concerned. If it does go further it could severely limit the possibility of mutual benefits from trade between market and planned economies based on comparative advantage.

- (c) The emphasis of measure aimed at penalising the ultimately excessive price is, at least it turns out according to the Community's anti-dumping practices, not the true target of anti-dumping action. The consideration of protecting the domestic industry, the Community industry in the European Community case, overrides other considerations. There is no point, therefore, of persuading authorities to change the target of anti-dumping action at present unless the industries concerned are better protected.

The proposal of using a true exchange rate test in East-West trade is a good idea, but lack of possibility of practical implementation:

- (a) To adopt the "true exchange rate" test, exporters need to be persuaded to believe that this is a fair test and the exchange rate used is one more fair than that of their government's official one. Not to mention the government's reluctance to admit its exchange is not true, the exporters might also doubt the fairness of the constructed exchange rate.
- (b) In determining the "fair price", to calculate the costs of the components of goods or raw materials may be relatively easier if the "true exchange rate" test is accepted, but in applying it to calculate the labour costs, it may not be so simple. In using this test, the lower labour cost will make all Chinese exports never be subject to anti-dumping actions, whereas relatively

higher labour costs in the USSR and high valuation of the rouble will make exports from the USSR targets of anti-dumping proceedings constantly.

- (c) More importantly, this methodology ignores the internal economic structure (eg, price structure, quota allocation, etc) of the NME countries, which is the primary reason for the current GATT law of using the analogue country test in dealing with alleged dumped imports from non-market economy countries.

There has long been much controversy as to whether it is too easy to invoke anti-dumping actions. In fact, anti-dumping actions have been used as trade barriers by industrialised countries, including the EEC, to protect their markets. A demand for further amendment of the GATT Anti-dumping Code has been made. And a request for restrictive interpretation of the Anti-dumping Code, particularly towards imports from developing countries, has also been voiced. The present thesis is not to discuss the GATT rules in general, but to focus discussions on the EEC rules, especially the EEC rules relating to imports from China. The following suggestions are therefore concerning the EEC rules.

In the first place, the concept of the NME should be clarified. As discussed above, this concept is not an accurate one in describing the Chinese economy any more. The anti-dumping rules based on such concept is not appropriate. If the concept of the NME has to be used in the Community anti-dumping regulations, the Community ought to give

a clear, objective definition as to what is an NME, as is done by its American counterpart. Further, the method of deciding of what is an NME shall also be modified so as to reflect the realities in the countries concerned. The way of enumerating countries as NMEs, without giving any explanation, or giving the countries concerned a chance to contest, is not only rigid, but also unfair. It is a disincentive for countries like China or Hungary to move further into a market-orientated direction.

Secondly, if the NME concept is still used by the Community in trading with countries such as China, and the Community is classifying a particular country as an NME country, then the anti-dumping rules should not be applied between the Community and the country in question, because under the current trade law between the Community and the country in question a selective safeguard clause is always applicable between them. As is well recognised, the concept of dumping is meaningless in the context of trade between the NME countries and the free-market economy countries. Such meaningless, unpredictable and, indeed, protective measures should be replaced by more predictable, acceptable and meaningful ones. In this regard Dr Dale's suggestion may carry merits. A well drafted safeguard clause should replace the anti-dumping rules in connection with East-West trade.

Thirdly, if the anti-dumping rules are going to be applied to countries which have been classified as NMEs, then the fabricated, totally unpredictable analogue country test should be replaced by a

more predictable, less discriminatory one. For example, as far as imports from China are concerned, the normal value can be found in one of China's Special Economic Zones ("SEZs"), or can be constructed in accordance with the market prices in these SEZs, where market forces play a dominant role. The analogue country test not only gives all discretion to the administration in deciding which country is chosen to be the analogue country, but also puts the exporter in a position that it will never know which country would be chosen in future actions.

Finally, before the Community may eventually move to change the rules, the Commission should follow the statement of an Advocate General of the European Court of Justice in choosing analogue countries which set a comparable level of economic development as one of the essential characters in choosing an analogue country, in order to reach a more equitable result. In the past the Commission has decided, in most cases, to choose analogue countries with a much higher economic development level than that of China in anti-dumping cases involving imports from China.

Footnotes (Chapter VII)

1. See Beseler & Williams; Anti-Dumping and Anti-Subsidy Laws; The European Community p363; Bull. EC 1979-1988.
2. OJ (1979) No C207/4.
3. Beseler & Williams; Supra 1 p363.
4. Reg (EEC) No 459/68 OJ (1968) No L93.
5. Beseler & Williams; Supra pp21-29; see also 1988 amendment OJ L209, 2.8.1988.
6. OJ L209, 2.8.1988.
7. Bull. EC 7/8-1988 point 2.2.8.
8. Article VI para. 1 GATT.
9. Article 2, paras. 3-7.
10. Article 2, para. 3(a).
11. Article 2, para. 3(b).
12. Ibid.
13. Article 2, para. 5.
14. Article 2, para. 8.
15. Beseler & Williams; Supra 1 p42.
16. Articles 9, 10, 11 and 12.
17. Article 4, para. 1.
18. Article 4, para. 2.
19. Article 4, para. 5.
20. Ibid.
21. Article 11, para. 1.
22. Article 4, para. 5.
23. Articles 6 and 7.
24. Article 11.
25. Article 12.

26. Article 10.
27. Beseler & Williams, p50.
28. Dale; Anti-Dumping Law in a Liberal Trade Order, p192.
29. Ibid pp192-195.
30. Bull. EC. 1979-1988.
31. See discussions in previous Chapters.
32. See Ivo Van Bael, International Trade Law and Practice of the European Community, p12. Between 1970-1976 only 26 anti-dumping proceedings were initiated; from 1977 to 1984, however, 301 proceedings were initiated.
33. See Bull. EC 1987-1988.
34. See discussions in Chapter VIII.
35. Ibid.
36. Ibid.
37. See Hein J Dietmann, Anti-Dumping & Anti-Subsidy Measures; the Practice of the European Community 1981-1984; CML Rev 1985 pp700-701.
38. Article 10 of Anti-Dumping Regulation.
39. J.H. Jackson, p393.
40. Com (83) 519 Final of September 28th, 1983 p4.
41. Dietmann; Supra p703.
42. Bull. EC 1979-1988, and various issues of Official Journal. Also see the Annex to the Chapter. The number of outcomes is higher than the total cases under investigation because the same case may have two different outcomes.
43. Van Bael, Supra pp101-103; Volker, Protectionism and the European Community, p175; and Biemann, Supra at p703.
44. OJ L209. 2.8.1988.
45. Beseler & Williams, Supra at p215.
46. OJ (1983) No L86/3; Commission Decision of March 30th, 1983 terminating the anti-dumping proceedings concerning imports of television image and sound recorders or reproducers originating in Japan (83/126/EEC).

47. Article 2(3).
48. Community Regulation (EEC) No 2423/88, and second supplementary provision to Art VI of the GATT and Report of the Working Party on the Accession of Poland, BISD, Fifteenth Supplement at p111 (Geneva, April 1968). Also see: Edwin A. Vermulst, Anti-dumping Law and Practice in the United States and the European Communities.
49. Article 2 para 5, Reg (EEC) No 2423/88.
50. The 1968 Regulation (Reg. 459/68) did not have specific rules applicable to non-market economies. The Community's special rules against non-market economies first came into force via Regulation 1681/79. This Regulation introduced a hierarchy of rules for calculating the normal value of products originating in non-market economies. But the amendments to Reg. 459/69 were not published in a Commission document, or in the "C" series of the Official Journal of the Communities; publication of these amending provisions is not required by law but is usual. In the absence of a published proposal for amendments by the Commission there is no explanatory memorandum to refer to. This is usually attached to the Commission proposal and explains the reasons behind, and the scope, of the provision. See Ross Denton, The Non-Market Economy Rules of the European Community; Anti-dumping and Countervailing Duties Legislation. 36 ICLQ (1987) p29.
51. The interpretative note to Article VI of the GATT stated that, with regard to a non-market economy country, "importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not be appropriate". GATT, Annex I, Notes and Supplementary Provisions, Ad. Article VI, para. 2.55 U.N.T.S. 187.
52. Ivo Van Bael, p43.
53. China's special economic zones, see Yearbooks of the Special Economic Zones, Vols. 1, 2, 3 and 4. Sonoko Nishitateno, China's Special Economic Zones: Experimental Units for Economic Reform, 32 ICLQ (1983) p175. The recent development of the Special Economic Zones, see Beijing Review Nos. 34, 36, 36 and 37 (1989).
54. Hong Kong's status after 1997, see Sino-British Joint Declaration on the Question of Hong Kong, 1984.
55. Ross Denton, p210.
56. Memorandum from Binder to Parkin, regarding the use of Yugoslavian home market prices in the anti-dumping investigation of certain steel wire nails (1985). See also E.A. Vermulst pp353-386.
57. E.A. Vermulst, p354.

58. Article 13 of the GATT Anti-dumping Code BISD 26 Supplement (1978-1979) p184.
59. Article 2(5), Regulation No 2423/88, OJ No L209, 2.8.1988.
60. OJ (1983) No L110/11.
61. Ibid p12.
62. See Commission Decision of May 6th, 1984 terminating the anti-dumping proceeding concerning imports of caustic-burned natural magnesite originating in China. OJ (1984) No L66/33.
63. OJ (1980) No L158/6; OJ (1982) No L236/23; OJ (1983) No L196/23; and OJ (1986) No L287/25 etc.
64. OJ L371/22 (1982).
65. Com. Reg. (EEC) 1633/86. OJ L181/19, (1982).
66. Com. Reg. (EEC) 84/82. OJ L11/14 (1982).
67. Com. Reg. (EEC) 2690/84, OJ L255/9 (1984).
68. See Carbon Steel Plate from Romania, 48 Fed. Reg. 317 (1983); and Carbon Steel Plate from Finland, 49 Fed. Reg. 48,781 (Dept. Comm. 1984).
69. See Annex to the Chapter.
70. See Applications of Anti-dumping Act to Controlled Economy Countries. Background Paper (Washington: US Government Printing Office for the Treasury Department, June 10th, 1986, p3.
71. Ibid.
72. Ibid.
73. See, for example, Sections 353.8 of the USA Anti-dumping Regulations of February 6th, 1980. 45 Fed. Reg. 8192 (1980).
74. Beseler & Williams, p67.
75. Ibid.
76. Timex case of 264/82.
77. Ibid.
78. OJ (1985) No L217/8
79. Gary N. Horlick and Shannon Stock Shuman, Nonmarket Economies and the US Trade Law in J.H. Jackson ed. International Trade Policy: The Lawyer's Perspective (1985) p14.02.

80. Ross Denton, p221.
81. Ibid.
82. Com. Reg. (EEC) 250/82 OJ 26/5 1982.
83. The three cases were Magnesite, Saccharin and its salts and Mechanical Alarm Clocks.
84. These cases were Silicon Carbide, Oxalic Acid and Paracetamol.
85. Cases 240/24, 255/84, 256/84, 258/84 and 260/84.
86. Ibid.
87. The Court judgment in Case 258/84 Nippon Seiko v Council of the EC
88. Ibid.
89. Ibid.
90. Com. Reg. (EEC) No 871/82. OJ L101. 1982.
91. OJ No L371/26, 1982.
92. OJ No L110/12, 1983
93. OJ (1982) No L371/22.
94. Ibid.
95. OJ (1984) No L66/34.
96. OJ (1983) No L110/11.
97. Leopold Lazarus Ltd v Secretary of State for Trade and Industry, Queen's Bench, Commercial List, March 6th, 1978, unreported
98. Beseler & Williams, Supra pp71-72.
99. Ross Denton, p230.
100. OJ No L286/8, 1977.
101. Article 17(1) of Council Reg. No 2423/88, OJ No L209 2.8.1988
102. Usually four months, with the possible maximum of six months. Article 11(5) of Council Reg. 2423/88.
103. See for example, OJ L115/1, 3.5.1988 and OJ L138/1, 3.6.1988.
104. Commission Reg. (EEC) No 14/88. B(5).

105. OJ L115/1, 3.5.88 and OJ L138/1, 3.6.88.
106. Joint case 239/8 and 27582 (1984) ECR 1005 etc.
107. Ibid.
108. Article 7(7)b of Council Reg. No 2423/88 OJ L209/10, 2.8.1988.
109. Alusuisse v Council and Commission (1982) ECR 3463.
110. John A. Usher, European Court Practice, p6, 8 and 9.
111. See, eg, NTN Toyo Bearing v Council (1979) ECR 1292 and Supra 106.
112. Dale, p194.
113. Ibid.
114. Ibid p197.
115. Ibid.
116. Supra 79.
117. See discussions in Chapter III.

ANNEXEEC Anti-Dumping Proceedings Against Imports From China

Initiation	Product	Analogue Countries	Further Development
1979	Saccharin and its salts	Korea (weighted average price of exports to Australia and the USA)	Undertaking accepted 1980 Undertaking lifted 1983
1979	Mechanical alarm clocks	Hong Kong (export price)	Undertakings accepted 1980
1980	Furfural		No injury
1981	Oxalic acid	Spain	Definitive duty (34.2%) 1982
1981	Paracetamol	Complaint: USA Commission: India	Undertakings accepted 1982
1982	Pears in syrup	Complaint: Australia Chinese exporter: Argentina Commission: South Africa	Undertakings accepted 1983
1982	Natural Magnesite (caustic-burned)	Spain (following Council rejection of Commission proposal for imposition of duty, later substituted by Austria export price)	Provisional duty 1982 Undertaking accepted 1984
1982	Natural Magnesite (dead-burned)	Spain	Provisional duty 1982 Provisional duty extended 1983 Reviewed 1985 Terminated 1986
1982	Barium chloride	USA	Provisional duty 1983 Definitive duty 1983
1983	Lithium hydroxide	USA	Undertakings accepted 1983
1983	Artificial corundum	Yugoslavia	Provisional duty 1984 Undertakings accepted 1984
1984	Silicon carbide	Complaint: Yugoslavia Commission: Norway (constructed value)	Undertakings accepted 1986

Initiation	Product	Analogue Countries	Further Development
1984	Roll chains for cycles	Complaint: Japan (Spain) Exporter: India Commission: Spain	Provisional duty 1985 Undertakings accepted 1986 Proceeding re-opened 1987 Provisional duty 1987 Definitive duty 1988
1985	Hammers		No injury
1986	Potassium permanganate	Complaint: USA Exporter: Thailand Commission: USA	Provisional duty 1986 Definitive duty 1986 Undertakings accepted from one Chinese exporter 1986 Proceeding re-opened 1988 Provisional duty 1988 Definitive duty 1988
1986	Paint, distemper, varnish and similar brushes	Sri Lanka	Undertakings accepted 1986 Proceeding re-opened 1.1988 Provisional duty 10.1988 Definitive duty 1989
1987	Oxalic acid	Spain	Undertakings accepted 1988
1987	Paracetamol	Complaint: USA Exporter: challenged choice Commission: USA	Provisional duty 6.1988 Definitive duty 12.1988
1988	Calcium metal	USA	Provisional duty 1989
1988	Small-screen colour television	pending	
1988	Barium chloride	pending	
1988	Tungsten metal power	pending	
1988	Ammonium paratungstate	pending	
1988	Tungstic oxide and tungstic acid	pending	

CHAPTER VIII

EEC - CHINA TRADE IN TEXTILES

- A. Trade in Textiles: Introduction
- B. The 1979 Textile Agreement
- C. The 1984 Supplementary Protocol
- D. Prospects and Conclusions for EEC - China Textile Trade

CHAPTER VIII

EEC - CHINA TRADE IN TEXTILES

The law of international trade in textiles is separated from the international trade law system under the GATT for decades. This reflects the political and economic relations in international textile trade, especially the relations between the developed and the developing countries. The European Community, one of the major textile products importers, has played a crucial role in international textile trade and the legal regime governing the trade. China, a new member of the Multifiber Arrangement (MFA), has been involved in the textile trade for a long time and has been becoming a major supplier over the last few years. Textiles products are one of the major trading products between the EEC and China. The two parties concluded a textile agreement in 1979 and amended and extended it in 1984 and 1988 respectively. The current agreement will operate from 1st January, 1989 to 31st December, 1992. This Chapter is going to review very briefly the history of the legal system of international trade in textiles, the EEC's role in this system and, in more detail, the relations and legal issues between the Community and China in the textile trade. The analysis is concentrated on pre-1989 issues. However, the comparison with the post-1989 legal regime and analysis of legal problems in future development will also be made.

A. Trade in Textiles : Introduction

Textiles play an important role in today's international trade. According to Das, international trade in textiles accounts for nearly 5 percent of the total world trade and nearly 9 percent of the world trade in manufactured goods¹. For developing countries, textiles form an even more important part of their exports. The exports of textiles accounted for about 27 per cent. of the total exports of manufactured goods from the non-oil developing countries and nearly one third of their manufactured exports to the developed countries². As far as China is concerned, textiles are crucial to China's economy. It is an industry which attracts massive employees to a country like China with a population of over one billion. Its political and economic importance should by no means be underestimated. The total value of output of textile products in 1986 was RMB¥ 93.3 billion (one sterling pound equals 5.95 Chinese RMB¥ on July 25, 1987)³. This accounted for nearly 5 per cent. of the total Chinese gross national products (GNP) in that year⁴. China has 24 million spindles working, which is claimed to be the largest amount in one country in the world⁵. As the largest developing country, China needs to export more to earn hard currencies in order to meet its increasing domestic demands. Textiles logically become the most important export manufactured products in its international trade. China's exports of textiles in 1986 was US\$ 6.5 billion, 24.1 per cent. of its total exports of that year⁶. In 1987, the exports of textiles reached as high as US\$ 8.8 billion⁷. And in 1988, textiles to the value of over US\$10 billion were exported, a quarter of China's total exports in

that year⁷. During the last ten years, China's exports of textiles have increased immensely. Earnings from textile exports formed a substantial part of China's foreign exchange earnings (see Chart 1).

Chart I: China's exports of textiles between 1977 and 1988 (US\$ billion)

Year	Amount of exports	Per cent. in total exports
1977	1.521	20.0
1978	2.138	21.9
1979	2.876	21.1
1980	3.268	17.9
1981	3.492	16.7
1982	3.660	16.8
1983	4.179	18.8
1984	4.929	20.2
1985	5.470	12.9
1986	6.500	24.1
1987	8.800	23.5
1988	10.500	24.1

Sources: 1977-1984: Almanac of China's Foreign Economic Relations and Trade 1985,
 1985: Beijing Review January 26, 1987,
 1986: People's Daily July 4, 1987,
 1987: People's Daily May 18, 1988,
 1988: People's Daily February 4, 1989.

China is increasingly becoming one of the world's leading suppliers in international textile trade. In the United States market, for example, imports of textiles from China were virtually neglected until the late 1970s, but in 1986 China became the second largest supplier, with imports growth since 1980 of 370 per cent., or more than 1.2 billion square yards⁸. In the European Community, the story was very similar, Chinese textiles of MFA products alone into the Common Market grew from 31 thousand tons in 1978 to 191 thousand tons in 1987, a growth of 516 per cent.⁹. (See Chart II).

Chart II: Chinese exports of textiles into the Community Market
Between 1978 and 1987

Year	Amount of exports (of MFA products)	
	Tonage (1000)	Values (million ECU)
1978	31.0 (Member States of 9)	127.3
1979	40.9	187.1
1980	59.2	292.5
1981	70.5 (Member States of 10)	415.8
1982	78.1	473.5
1983	88.0	548.9
1984	96.1	671.0
1985	107.5 (Member States of 12)	817.4
1986	136.2	893.6
1987	191.1	1,244.5

Sources: Compiled by author through interviews with Officials in the Commission and Mofert.

The textile trade between the Community and China has proved to be a problematic area between the parties, not only because of the dramatic increasing inflow of Chinese textile products into the Community, but also because of the uncompetitively low price of such products, which has created a situation of bitter competition in the Community. The textile industry in the Community was alleged to be in danger of collapsing.

Trade in textiles between the European Community and China is governed by a separate legal framework, although certain principles in the 1978 Trade Agreement may apply. The Community concluded a textile agreement with China in 1979¹⁰, which granted significantly increased access for textile products from China to the Community market¹¹. When this agreement expired in 1983, the Community and China expanded the arrangement through the Additional Protocol in 1984, which became

more restrictive than the previous one. The 1984 Protocol expired at the end of 1988. The two parties negotiated a new agreement which was to run from the beginning of 1989 to the end of 1992. This Chapter is going to analyse mainly the 1979 and 1984 agreements in the context of the EEC textile trade regime in general, and the global aspects of the international textile trade.

B. The 1979 Textile Agreement

1. Background

The European Community concluded the textile agreement with China soon after the 1978 Trade Agreement was concluded. For a long time textiles were the principal export items from China to Western Europe, though the total amount of it was not a large portion of EEC's importation until late 1970s. Before the textile agreement was concluded, the textile trade between them was governed by the Community's autonomous policy. Common rules for imports from State-trading countries were established under Regulation (EEC) No L109/70, which applied to those products which were liberalised under such regulation¹². Textile products, along with the other products which were not liberalised at the Member States and the Community level, were subject to the Council Decision No 74/652/EEC of 2 December, 1974, laying down the import arrangements applicable in the Member States to imports of products subject to quantitative restriction from State-trading countries, which was adopted as a provisional measure to ensure continuity in trade with State-trading

countries, including China¹³. In the following year, the Council issued a decision on unilateral import arrangements in respect of State-trading countries for products including textiles¹⁴. According to this decision, the Council should adopt any amendment, before 30 November each year, which it appeared necessary to make for the following year to the quotas¹⁵.

Once the Community established official relations with China the Chinese party could no longer accept the unilateral arrangements by the Community, especially when the Chinese modernisation plans were expanding rapidly and the country desperately needed to increase exports in textiles in order to augment foreign exchange earnings to cover, as far as possible, the importation costs of industrial items that were needed. Indeed, the textile trade had become a major source of disagreement between the Community and China, and had developed into a serious dispute between them at that time¹⁶. Although the parties successfully negotiated a Trade Agreement in 1978, it only provided some general principles¹⁷. In the textile trade sector, a more concrete arrangement was highly desirable. For the Chinese exporters, it might give them an opportunity of a secured access to the EEC market; for the Community, it would enable the Community more easily to control the inflow of textiles from China, which, with rich raw materials and a cheap labour force, acquired enormous export potential.

2. The Negotiation

Negotiation of the textile agreement started in due course, but it proved to be very tough. The Chinese negotiators wanted to obtain an increase in its textile exports from the existing level of 20,000 tons a year to 60,000 tons a year¹⁸, an amount the Community was not prepared to accept at a time when the developed world was hit by the recession and the textile industry in the Community fell to its lowest level in 1980¹⁹. The different interest groups put pressure on the European Community not to make any major concession. The pressures came from the textile and clothing industry in the Community, members of the European Parliament, and also the third world textile suppliers²⁰. But there were also contradictory pressures within the Community on the impression of the vast potential of the Chinese market.

The compromise came from the fact that the Chinese negotiator gave in. The Community successfully persuaded the Chinese negotiator to withdraw from the request of huge quotas into the Community. It should be noticed that in negotiation practice, the Community employed tactics which had from time to time actually given the Community more bargaining powers at the negotiation table. A tactic of two dimensions was employed by the Community: the Council issued a mandate, and the Commission would negotiate the relevant agreements with the counterparts concerned according to the mandate. In the case of negotiation with China, the Commission successfully persuaded the Chinese party to accept the arrangement of making 23 categories of

textile products in Annexe IV to be subject to quantitative restrictions²¹; it also successfully argued that an amount of 60,000 tons quota a year to China was exceeding the global ceilings set in the Council's mandate, and had little hope of being accepted by the Council²². For products not subject to quantitative restrictions in Annexe IV, a basket extractor mechanism was incorporated into the agreement, according to which, various specific levels of importation for different groups of products had also been fixed²³.

The EEC-China textile agreement did not, however, limit Chinese textile exports to a nil or low increase rate. In fact, the agreement provided for Chinese textile products a significant increase for the quotas of products under Annexe III²⁴, and a relatively larger proportion of textile products other than those under quantitative restrictions into the Community²⁵. If this agreement is reviewed in the context of the Community textile policy in general during the period of the MFA II²⁶, taking into consideration the restrictive attitudes of the European Community towards the developing suppliers at that period of time²⁷, it is safe to conclude that in the 1979 textile agreement the Community has made, to certain extent, concessions regarding textile imports from China in the following ways: large increase of quotas; big proportion of cake of EC global ceilings; better terms with respect to flexibility than normal bilateral agreements under the MFA II and large annual growth rate etc²⁸. Although China was not a member of the MFA until January 1984²⁸, the terms accorded in the 1979 textile agreement were even more favourable towards China than normal MFA II bilateral agreements

concluded between the Community and some developing countries. Many reasons may explain why China had been granted such relatively favourable terms in the textile agreement at the time when the Community was taking very restrictive attitude towards textile imports. Among others, two main reasons should be mentioned here. First, China had engaged in textile trade for a long time, but the volume of the trade was relatively small. In this respect, China might be regarded a newcomer at that time, and it was therefore easier for the Chinese to get better terms than those who had already become leading suppliers. Second and more importantly, China had stronger bargaining position in comparison with other developing suppliers because of its enormous potential market. Major trade partners (including the EEC) wanted to get a larger share of the opening Chinese market via the concessional treatment to China in textile trade³⁰.

3. The Legal Mechanism

The large increase of quotas from China, and some other favourable terms towards China in the textile agreement does not mean that the agreement is favourable only for China, nor that the interests of the Community and its textile industry are ignored. On the contrary, the terms of the textile agreement on the whole are clearly more favourable to the Community, and the legal mechanism accorded in the agreement is, by and large, intended to protect the Community textile industry.

a. Arrangement of Quotas

When the 1979 textile agreement was concluded, China was not a member of the MFA. The agreement, however, was analogous to the bilateral agreements between the European Community and the developing suppliers concluded under the MFA II. The products covered by the EEC-China textile agreement were, therefore, the same as products covered by the MFA II³¹.

The arrangements of quotas were detailed in Articles 2 and 3 of the agreement, and Appendices I and III to the agreement. Under such arrangements, the Community undertook to suspend the import quotas in force prior to the conclusion of the agreement, and not to introduce further quotas in respect of the products listed in Appendix I³². Measures equivalent to Community import quotas were also forbidden³³. On the other hand China agreed to stipulate and maintain export quotas for its products to the Community in accordance with Appendix III³⁴.

The quota arrangements have served the Community's desire to firmly control textile imports from China in order to prevent the "market disruption". This purpose has been achieved not only because the same article has provided that "in the management of the quota mentioned in paragraph 1, China will ensure that the Community's textile industries benefit from the use of the quotas"³⁵, but the statement of general purpose in the preamble of the agreement has also emphasised the Community's interests "to eliminate the real risks of market upsets"³⁶. Moreover, although the provisions in Article 2

restrict the Community from imposing any further quantitative restrictions over textile imports from China, it has so far failed to prevent the Community to do so. Over the duration of the agreement, the Community, through the consultation procedures established in Article 16 of the agreement, has successfully persuaded the Chinese government to accept more quantitative restrictions for the products which were not covered by the original quota arrangement³⁷.

b. Base Level, Growth Rate and Flexibility

As with other bilateral agreements under the MFAs, the EEC-China textile agreement also incorporates the structure of base level, growth rate and flexibility.

- (i) Base level: the base level is the annual level at which the quantity of export of a particular product is restrained. The principle is that the base level of export in the first year of the restraint cannot be lower than the annual level that it has already achieved unless a "roll back" has been qualified³⁸. The base level in the 1979 EEC-China textile agreement, as discussed above, increased from the existing 20,000 tons a year, to 40,000 tons in 1979³⁹, a result of compromise: China wanted 60,000 tons a year at first⁴⁰.
- (ii) Growth rate: if the restriction is to continue beyond one year the levels for the subsequent years have to be higher, allowing for a growth over the level for the previous year.

The minimum growth rate provided in MFA I was of 6 per cent. In the restraint levels for the products under restraint, certain exceptions have provided for the growth rate being lower than 6 per cent.⁴¹. In the 1979 EEC-China textile agreement, the growth rate of import for the products subject to quantitative restrictions was far below the 6 per cent., especially the products in Group I⁴². The growth rate for products in category 1 was as low as 0.6 per cent., the growth rate for products in category 2 was even lower⁴³. Among the products of all 23 categories restrained by the quotas, only the products of category 20 and 39 were above the minimum growth rate of 6 per cent.⁴⁴. In short, the Community had successfully restrained the growth rate of textile imports from China to a very low level.

- (iii) Flexibility: there are three types of flexibility in utilising the opportunities within the restraint levels by an exporting country. These are swing, carry forward, and carry over. Swing is the adjustment among the restraint levels for various products during a particular year. The MFA I contained a provision for 7 per cent. swing meaning thereby that the export of a particular product may exceed the restraint level in a given year by 7 per cent.⁴⁵. In the 1979 EEC-China textile agreement, however, swing between products was restrained to 5 per cent. in general⁴⁶. Also, Group I products were separated from the others, the products of categories 4, 5, 6, 7 and 8 were authorised to

transfer only between themselves⁴⁷, and the products of categories 1, 2 and 3 were authorised to transfer between themselves, with the reservation that the category 1 products could not have increased transferring⁴⁸.

When the level of export of a product is likely to exceed the restraint level in a particular year there is a provision for borrowing from the quota of the same product in the next year, ie, carry forward. The MFA I provided for a 5 per cent. carry forward. The 1979 EEC-China textile agreement also permitted a 5 per cent. carry forward⁴⁹. Similarly, when the restraint level of a product in a particular year is not fully utilised by the actual export, there is a provision for utilisation of the unused level in the next year, ie, carry over. The 1979 EEC-China textile agreement provided for a 5 per cent. carry over, which was much lower than the 10 per cent. carry over provided for by the MFA I⁵⁰.

The flexibility accorded in Article 5 of the agreement was further restrained by two provisions. First, a product in a category could not, as a result of the cumulative application of the flexibility measures, exceed 15 per cent. during any one year in any case⁵¹. Second, recourse to the measures of flexibility must be notified in advance by the Chinese authorities⁵².

On the whole, the terms accorded in the EEC-China textile agreement, in respect of the base level, growth rate and flexibility, were the products of compromise of bargaining: they were to some

extent better than what other developing suppliers had got at the time when the bilateral agreement concluded between the EEC and other developing suppliers under the MFA II were shadowed by "reasonable departure" clause, the Community was very restrictive towards the textile imports from these countries and regions. But, on the other hand these terms were also very restrictive with flexibility reduced to a low level, and the growth rate far below the minimum growth rate established in MFA I.

c. The Basket Extractor Mechanism

In order to control imports from developing suppliers, the Community operates a basket extractor mechanism which provides that in the situation wherein a supplier country exceeds a certain level of a given MFA product in the basket (the so-called threshold level), which is not subject to the Community quantitative limits, the Community may nevertheless ask for consultation with the country concerned, with the aim of fixing a quota for the given product. Should no agreement be reached during the negotiation, the Community can then impose a restriction by itself, but not lower than the threshold or 106 per cent. of the imports of the previous year⁵³. This mechanism was incorporated into the 1979 EEC-China textile agreement. The agreement stated that when imports from China reached 0.2 per cent. in the case of Group 1 products, 1.5 per cent. in the case of Group II products, and 5 per cent. in the case of Group III products, of the total volume of the previous year's extra - EEC imports products of the same category, the Community might ask for consultations. During the

consultation, China should, from the date of notification of the request for consultation, suspend or restrict exports of the product in question to the Community, or to the region or regions specified by the Community, to the level of triggering off the consultation. At the same time, the Community, for its part, might subject the importation of the products concerned to a quota at the level notified in the request for consultation⁵⁴. If no agreement can be reached during the consultations within a month of initiating the consultation, the Community was then entitled to introduce a definitive quota unilaterally. If such quotas were introduced, the annual growth rate of the quotas should be stipulated by mutual agreement between the parties. If there was no mutual agreement on the growth rate, the Community would be likely to have the right to decide. This mechanism was a double lock in protecting the Community market for it eventually granted the Community the right to put previously unrestricted products under restrictions whenever the Community considered necessary. The Community had utilised this mechanism from time to time to protect its market. It managed to increase the number of textile products originating in China and under restriction from 23 to 37 product categories over five years operation of the 1979 textile agreement⁵⁵.

The basket extractor mechanism might also be initiated between China and a single Community region, or regions, because the quantities of MFA products allocated to China in the basket are, in fact, distributed among the Community regions on a pro rata basis of their theoretical quotas as defined by the term "burden sharing"⁵⁶.

The share of the quotas was subsequently modified in 1981 when Greece joined the Community⁵⁷, and modified again when Spain and Portugal also became Member States⁵⁸. When the imports concerned exceeded the "share" of a Community region, the basket extractors mechanism might be applied. This practice had further restricted the flexibility of Chinese textile exports to the Community because certain regions in the Community, notably the UK and West Germany, are far more marketable than others. It is submitted that such a practice is inconsistent with the idea of the single market and should be abandoned after 1992⁵⁹. The "share of burden" system, however, has been incorporated into the new textile agreement between the EEC and China which will be valid to the end of 1992⁶⁰.

d. Price Clause

In the textile agreement, there was a price clause under which importation would be suspended, should the price of textile fall below a fixed level. According to the agreement, the price of textiles sold to the Community, originating in China, should take particular account of the prices usually governing similar products sold under normal trade conditions by other exporting countries in the importing country's market. If textile products from China were imported at prices lower than that, the interested party might request consultation, and under critical circumstances, the competent Community authorities might suspend delivery of import documents or licences⁶¹.

The purpose of this provision is to prevent low priced Chinese products distorting the Community market. It is also a common clause regarding textile imports from other State-trading countries⁶². The rationale behind it is that the State-trading countries can manoeuvre the price to the extent that it may distort the market.

Problems arise from such a provision. In the first place, what prices are "the prices usually governing similar products" is not very clear, the only thing clear here is that these prices cannot be the prices of textile products from other State-trading countries, since there is a similar price clause in the textile agreements between the Community and countries concerned to prevent textiles from these countries being sold at low prices. In the second place, "normal trade conditions" "in the importing country's market" is a matter of fact, such fact should be established by criteria clearly applicable. Such criteria are not provided. Thirdly, and more importantly, there is also no criteria of "critical circumstance" in the provision to enable the Community to take appropriate action. Eventually, the Community will have complete freedom to suspend the imports if it is regarded as necessary "in the expectation of reaching a mutually acceptable solution"⁶³. Under such circumstance, a shotgun solution is to be expected.

The direct consequence of this provision is that textile products from China can never be sold at the lowest price in the Community no matter how competitive they might be, since the Community can always ask for consultation if the price is lower than similar products from

other sources into the Community, or even suspend the importation if the Community considers this necessary. In this sense, such a price clause, it is submitted, is discriminatory in nature, since it has made pre-emption of any possible economic efficiency and other comparative advantages existing in China. Arguably, such advantages do exist. The massive labours are very low-paid and certain raw materials, for example silk, are only or principally available in China⁶⁴.

Another legal effect of such clause is that it also excludes the possible application of Community anti-dumping rules in Chinese textile imports. Because the problems and fears of low priced imports of Chinese textiles can easily be removed through consultations and/or unilateral actions, there is no need to initiate a proceeding of anti-dumping although some producers have from time to time threatened to start the complaints procedure to the Commission. This probably explains why there have been no anti-dumping proceedings involving textile products from China whilst many other Chinese imports have become principal targets of EC anti-dumping proceedings⁶⁵.

e. Anti-Surge Clause

The anti-surge clause was not commonly employed in bilateral textile agreements until it was embodied into the MFA III⁶⁶. Arguably, it might be regarded as an innovation of the MFA III, a new tool to tackle the problem of the possibility of a sudden increase of textiles imports even though these might well be within the negotiated

restraint level⁶⁷. However, it was in 1979, much earlier than the MFA III, that the Community was able to persuade the Chinese negotiator to agree to incorporate a provision similar to the anti-surge clause into the textile agreement between them. In the agreement, China undertook to "make every endeavour to ensure that exports of textile products subject to quotas shall be distributed as regularly as possible over the year, taking particular account of seasonal factors"⁶⁸. While this provision did not directly provide the instrument for the "mutually satisfactory solutions or arrangements" as an ordinary anti-surge clause did, it nevertheless granted the Community a right to request from Chinese textile exporters a more gradual growth in the utilisation of the quotas agreed, otherwise the consultation procedure, on the grounds of problems arising from the application of the textile agreement, could be triggered. It is safe to say that such provision is at least a half-way through to a typical anti-surge clause later. The effect of such provision is that China lost the certainty of when it is allowed to use its allotted quotas freely and to the full⁶⁹.

f. Double Administrative Control

This was a common provision, not only incorporated in the EEC-China textile agreement, but also in other EEC textile agreements. The double administrative control system provided that exports from China should be subject to export licence issued by the Chinese authorities, and imports into the Community, on the other hand, should be subject to the import licences or equivalent documents issued by

the Member State in question and applied by the importers according to the contracts. The double administrative control system was not merely applicable to products under the quantitative restriction but also to all products including those not under the restriction. This technique could control effectively the inflow of textiles from particular sources such as China.

g. Guaranteed Raw Materials Supply

The most special feature in the EEC-China textiles agreement was the provision under which China undertook to supply minimum guaranteed quantities of textile raw materials, (pure silk, angora, cashmere etc.) to the European textile and clothing industry in the light of market practice and normal trade price⁷¹. In order to have a strong position in the bitter competition of the international textile and clothing market, it is very important for the European manufacturers to have constant access to raw materials from China⁷². This is probably another explanation of why the Community granted Chinese exporters the opportunity of unusual increasing in the common market. In practice, the agreement provided that, before the end of year, the Community might submit to the competent Chinese authorities a list of the interested producer/processing companies and, if appropriate, the quantities of raw materials required by them. The Chinese authorities, bearing in mind of China's export capabilities, should give favourable consideration to these orders in order to satisfy Community industry's requirements⁷³.

The agreement requested the parties to review the possibility of increasing the ceiling of Chinese raw material supplied to the Community every year⁷⁴. It did not, however, provide a minimum annual growth rate for the Community industries. Problems may arise out of this provision when the Chinese textile industry also needs such raw materials. It has actually happened that because of the increasing domestic demand, China cut down the supply of raw materials to the Community⁷⁵. In my view in order to improve further the Community industry's opportunity of access to Chinese raw materials the system, therefore, needs to be amended to the extent that a annual growth rate of the raw material supply should be fixed to the general annual growth rate of Chinese textile imports into the Community.

h. Imports into China from the Community

Another special feature in the EEC-China textile agreement was the stipulation in the agreement regarding textile products imports into China from the Community. The agreement provided that, in return for increased export prospects for Chinese textile products into the Community, China should encourage and facilitate the importation into its own market of textile products originating in the Community⁷⁶. To this purpose, China undertook not to aggravate and, if possible, to reduce the imbalance in the textile trade balance with the Community from 1 to 5.3 in terms of value⁷⁷. Both parties would examine the situation of the textile trade each year. If, after the second year of the textile agreement, any change in the imbalance of the textile trade balance became apparent, the consultation procedure should be

employed in order to remedy the situation. In cases where no agreement had been reached, each party was entitled to take unilateral action to maintain 1 to 5.3 formula⁷⁸.

China also undertook that, if more imports of textiles products into China were needed, preference would be given to importing the products of EEC origin⁷⁹, and if the Community felt it had been placed in a disadvantageous position vis-a-vis a third country, the Community might request consultations with China in order to adopt appropriate measures to balance the rights and obligations under the 1978 trade agreement⁸⁰. This provision is intended to provide a guaranteed access to the Chinese market by the Community textile and clothing industry whilst the Community will inevitably increase its imports from China. It requires China to open its own market in line with the increasing of its exports of textiles to the Community.

i. Textile Committee and Consultation

A textile committee was set up according to the textile agreement which consisted of representatives of the contracting parties appointed by the Joint Committee established under Article 9 of the 1978 Trade Agreement⁸¹. The textile committee has been granted a wide range of powers: consultations provided in this agreement should be conducted within the committee, and any other problem arising from the application of the agreement should also be dealt with within the committee⁸².

Procedures for consultation have also been set up, that is: a request for consultation must be in writing. A report stating the reasons and circumstances which, in the opinion of the requesting party, justified the making of such request, should be promptly followed (in any case not more than 15 days' notice)⁸³. Consultations should be initiated within one month of the notice of the request in order to reach an agreement or mutually acceptable conclusion also within one month⁸⁴.

The textile committee established hereunder plays an important role in running the highly regulated textile trade between China and the EEC smoothly. Because there is no particular subject the textile committee is limited to deal with, the committee is empowered to discuss virtually any problem relating to the textile trade between them. This has been another reason why Chinese textile products have not been subject to EEC anti-dumping proceedings so far⁸⁵. However, Article 16 does not provide the solution for the situation where the contracting parties cannot reach a mutually acceptable conclusion in consultations. In such circumstances the contracting party is actually entitled to take measures it deems appropriate. Since the Community is basically a textile importer from China, it is clear, therefore, that such a clause is mainly to protect the Community's interests.

This viewpoint is supported by various other parts of the agreement. Article 6 provides, for example, that the Community may request consultations in order to reach agreement on an appropriate

quota level, if it notes that imports of the Chinese textiles have reached a certain level of the total volume of the previous year's extra-EEC imports of products of the same category⁸⁶. In such case China shall suspend or restrict exports of the product category in question to the Community. The Community for its part may subject the importation of the products concerned to a quota at the level notified in the request for consultation⁸⁷. Moreover, if the consultations do not enable the parties to produce a satisfactory solution within the time limit mentioned above, the Community shall be entitled to introduce a definitive quota unilaterally at an annual level not less than the level indicated in the request for consultation⁸⁸. Example could also be found in Article 13 of the agreement. It provided that if after the second year of the agreement, any change in the imbalance of the textile trade balance (1:5.3) became apparent, at the request of either party, the consultation procedure should come into effect in order to remedy the situation. In the event of the parties not reaching an agreement or a mutually acceptable conclusion, each party should be entitled to take the appropriate measures⁸⁹.

4. Some Comments

The 1978 textiles negotiations and the textile agreement concluded in 1979 between the Community and China increased Chinese textile imports into the Community significantly. In fact, the 1979 textile agreement made concessions to Chinese exporters in some way in terms of growth rate of Chinese textile products into the Community market. It was particularly true under the circumstance when the

Community was taking a very restrictive attitude towards other developing suppliers under the MFA II. This was because China was a relative newcomer in the textile trade at that time, and also because of the potential Chinese market to the Community.

However, the quotas arranged thereunder were considerably lower than China asked for, and more importantly, the terms concluded in the agreement were clearly well devised to make textile imports from China under control and to protect the Community's industry. First of all, the special basket Extractors Mechanism had enabled the Community to subject all Chinese MFA textile products, including those which were not subject to quantitative restrictions, to some sort of limits. The Community, therefore, kept the initiative to restrict textile and clothing exports from China to the level it can and is willing to bear. Secondly, the Community successfully concluded a price clause into the textile agreement, under which importation would be suspended should the price of the Chinese textile products fall below a fixed level⁹⁰. Thus, any possible economic efficiency and other comparative advantages of Chinese textile products had been prejudicially denied. Thirdly, the agreement had made China undertaken to supply minimum guaranteed quantities of textile raw materials for the EC processing industry. This had not only provided a guaranteed access for the Community industry to rare materials such as silk, but also put a major challenge on the Chinese textile industry because these raw materials were also needed by the Chinese industry for the growing production capability. Finally, other clauses had also been incorporated into the agreement to control Chinese textiles. A

so-called "double administrative control system", for example, has been concluded into the agreement which was applicable to all products and not merely to those subject to limitations. Also, a clause similar to the "anti-surge clause" had been concluded which limits the possibility of using the allotted quotas freely.

The development of the EEC-China textile trade was dramatic, despite the restrictive terms concluded in the textile agreement. Chinese textile exports to the EEC increased from 30,911 tonnes in 1978 to 87,957 tonnes in 1983, increasing nearly two times⁹¹. The proportion of the Chinese textile products in the Community market also increased from 2.32 per cent. of total extra-EEC textiles in 1978 for about 5.5 per cent. in 1983⁹². Over that period of time, China gradually became one of the major textile suppliers in the European Community.

The increasing volume of cheap Chinese textiles coming into the Community market caused increasing concern both to the European textile and clothing industry and the European authorities. When the four-year agreement came to expiry in 1983, a tougher round of negotiations started, a more restrictive textile agreements was on its way.

C. The 1984 Supplementary Protocol

1. The Negotiations

Preliminary discussion on the renewal of the first EEC-China textile agreement started as early as May 1983. At that time, China was not a member of the MFA, and accordingly, the EEC textile producers, concerned by the quick expanding of Chinese textiles into the Community market, emphasised that China should not be given, in the new agreement, more favourable treatment than those MFA countries with whom the EEC had already concluded bilateral textile agreements at the end of 1982 under the MFA III⁹³. Various problems existed for the coming agreement. On the EEC side, the Commission did not require a specific mandate from the Council for the negotiations of the renewal of the EEC-China textile agreement. Therefore, the scope for flexibility in the negotiations was restricted to the extent to which the quotas were required to remain within the global ceilings and growth rates set down in the Council of the EEC Minister's Mandate of February 1982; the EEC could only envisage increases of approximately 6-7 per cent. in order to remain within the limits⁹⁴. On the Chinese side, however, China exported more than 600 million square yards equivalent of fabric and garments in 1982 to the Community, compared with 12 million square yards in 1972. Since textiles made up nearly a quarter of China's manufactured exports, the country relied heavily on the industry to earn the foreign exchanges it needed for its imports. China tried to push the European Community for an average 20 per cent. increase in its textile quota for the new

arrangements⁹⁶. Furthermore, from a regional point of view, China wanted to increase its sales where the possibilities for favourable market access were the greatest, such as Germany, whereas the Community's approach was generally one of burden sharing of the quotas between the Member States⁹⁷.

The first round of negotiation between the Community and China, against this background, broke down at the end of 1983⁹⁸. At the same time, China joined the MFA from January, 1984⁹⁹. New legal problems were brought about by this development of whether negotiations should be based on the MFA III or whether China was considered a dominant supplier within the MFA as opposed to a developing country. On the one hand, China would have more of a say by joining the MFA; on the other hand, while China's exports of textiles to the Community were comparable in tonnage to those of Macao or South Korea (which were regarded as dominant suppliers), there was a mounting opinion that China should be considered as a dominant supplier¹⁰⁰.

In reality, the parties simply followed the 1979 textile agreement, which according to its terms, was automatically renewed for five years. On March 29, 1984, the agreement was finally reached in the form of the Supplementary Protocol to the 1979 agreement (the Supplementary Protocol)¹⁰¹.

In the Supplementary Protocol, the Community tightened up its imports from China, put five more categories of textile products from China under the limits, and some 34 new restrictions have been imposed

on imports into various parts of the Community¹⁰². The importation of textiles from China are therefore under more severe restriction under the Supplementary Protocol. In return, the Community has agreed to increase some quotas, including those on highly sensitive products.

2. Amendments to the 1979 Agreement Legal Mechanism

When China and the EEC concluded the Supplementary Protocol in 1984, the MFA II was expired two years ago, and the MFA III was in operation. There were some changes and development from the MFA II to MFA III¹⁰³. Notably, the "reasonable departures" clause was discarded in the MFA III; instead it contained some new provisions to protect textile importing countries¹⁰⁴. Corresponding with these changes, some legal techniques used in the 1979 textile agreement have been amended, and some new techniques have been brought in.

a. Anti-surge Clause

The MFA III, was different from the MFA II in that the MFA III had incorporated a new legal tool to tackle the problem of the possibility of sudden increase in levels, even though these might be within the negotiated restraint level, ie the anti-surge provision. The MFA III expressed the developed importing countries concerns about "sharp and substantial increase in imports as a result of significant differences between large restraint levels negotiated in accordance with Annex B on the one hand and actual imports on the other"¹⁰⁵. Under such circumstances, the parties concerned "may agree to mutually

satisfactory solution or arrangements", if "such significant difficulties stem from consistently under-utilised larger restraint levels and cause or threaten serious and palpable damage to domestic industry"¹⁰⁶.

In my view, this provision was rather vague, the wording of "significant differences", "significant difficulties", "large restraint levels", "consistently under utilised" were not well defined, and needed to be further elaborated. Consequently, the question of which quotas and how much under-utilisation would attract the invocation of the anti-surge clause would depend a great deal upon the bilateral agreements and the way these would be implemented.

As mentioned above, the 1979 textile agreement had already concluded a provision similar to or halfway to an anti-surge clause¹⁰⁷. But that provision was not well developed at that time. The 1984 Supplementary Protocol on the other hand took the MFA III into consideration, a full range of anti-surge clause therefore had been incorporated into the Supplementary Protocol. The Supplementary Protocol provided that where the Community ascertained that the level of imports in a given category of Group I subject to quantitative limits exceeded in any agreement year the level of imports in the proceeding year by 10 per cent. of the quantitative limit, the Community might request the opening of consultation¹⁰⁸. In the consultation, the agreement should be reached on:

- (a) the suspension, wholly or in part, of the flexibility provided by Article 5 of the textile agreement;
- (b) a modification of the quantitative limit set out in Annex IV by the establishment of an ad hoc limit below the existing quantitative limit; and
- (c) the corresponding equitable and quantifiable compensation¹⁰⁹.

Under such a situation, and pending a mutually satisfactory solution, China undertook for a period of one month from the date of notification of the request for consultation, to restrain exports of the products in the category concerned to the Community market specified by the Community to one-twelfth of the level of exports reached during the proceeding calendar year¹¹⁰. Should the parties be unable to reach a satisfactory solution the Community was entitled to suspend wholly or in part, the flexibility for Chinese products provided in the textile agreement in respect of the Community or any of its regions for the category concerned, or to modify the quantitative limit set out in Annex IV for the category concerned so as to restrain exports to the Community to 125 per cent. of imports attained during the preceding calendar year, or to the level of exports up to the date of the request for consultations plus the level of exports carried to the Community during the consultations shipped from China before the date on which the request for consultations was submitted¹¹¹.

There were some limitations on the application of the anti-surge clause. Any of the following situations would prevent the Community from applying the anti-surge clause:

- (a) If quantitative limits established in Annex IV for the Community for the category concerned represented less than 1 per cent. of total Community imports during 1982.
- (b) If the level of imports originating in China during the current agreement year represented less than 50 per cent. of the quantitative limit set out in Annex III for the category concerned in the Community as a whole or in any Community region or regions concerned.
- (c) If the level of imports originating in China for the category concerned was lower than the level of imports of products in that category originating in China in 1982¹¹².
- (d) In the event that the anti-surge clause was applied, the Community undertook to maintain an offer of equitable and quantifiable compensation¹¹³.

The mechanism of anti-surge clause is a product of intention to protect the interests of the importing countries. It prevents any sharp and substantial increase of textile imports from China and therefore diminishes the difficulties for European industry. The application of this clause meant that in a number of instances the

Chinese suppliers lose the certainty that they would be allowed to use their allotted quotas freely and to the full¹¹³.

Anti-fraud Clause

In line with the changes in the MFA III, the Supplementary Protocol has also accorded an anti-circumvention clause¹¹⁴. The protocol provided that the parties agreed to co-operate fully in preventing the circumvention of the agreement by transshipment, re-routing or whatever other measures¹¹⁵. Where information became available to the Community that products of Chinese origin subject to quantitative limits established under this agreement had been transhipped, re-routed or otherwise imported into the Community in circumventions of this agreement, the consultation should take place with a view to reaching agreement on an equivalent adjustment of the corresponding quantitative limits established under this agreement¹¹⁶. Pending the result of the consultation, China should, as a precautionary measure, make the necessary arrangement to ensure that adjustments of quantitative limits might be carried out for the quota year in which the request to open consultations or for the following year if the quota for the current year was exhausted, if so required by the Community, and clear evidence of circumvention was provided¹¹⁷. Should the parties be unable to reach a satisfactory solution, the Community should have the right to deduct from the quantitative limits amounts equivalent to the products of Chinese origin, if clear evidence of circumvention had been provided¹¹⁸. This provision goes further than relevant provisions in the MFA III. In Article 8 of the

MFA, if the parties concerned cannot reach a mutually satisfactory solution, the matters shall be referred to the TSB. Paragraph 14 of the 1981 Extension Protocol confirmed that. In the EEC-China Supplementary Protocol, however, the Community had the right to say last words, if it could provide clear evidence. There were no clear definitions as to what was clear evidence, and in fact, statistics and information about bilateral textile trade were provided by the Community¹¹⁹, the Community clearly had the great disposal in this respect. However, it is submitted that if disputes do happen with respect to measures taken by one party, the other party shall have the right to refer the disputes to the TSB.

An inevitable issue in dealing with the problem of circumvention is the origin of textile products. Because China is undertaking a certain special practice with Hong Kong textile manufacturers, and this practice has caused legal problems and disputes in international trade, it is therefore necessary to discuss this here. On August 3, 1984, the US Custom Service, under the Executive Order 12,475 by the President, promulgated interim country-of-origin regulation¹²⁰. In this regulation, the traditional standard of "substantial transformation", as recognised by long-standing judicial and administrative precedent in the United States to determine the origin of products manufactured through multicountry processing operation, was abandoned. Instead it adopted a two-pronged "substantial manufacturing" test. Under this new standard, the country of origin of a textile or clothing product manufactured through a multi-country processing operation is the country in which that product last

underwent (1) "a substantial manufacturing or processing operation", (2) resulting in a "new and different article of commerce"¹²¹. Furthermore, the regulations also abandoned the case by case approach of determining origin under the traditional "substantial transformation" standard. Rather, it created per se rules which determined arbitrarily that certain manufacturing operations would never confer country-of-origin status¹²². The most significant effect of these changes was that final assembly through sewing, looping, or linking of component parts knit or cut in another country no longer would confer country-of-origin status on the country of assembly¹²³. The regulations particularly affected a large volume of sweater trade that was manufactured through knitting operations undertaken in China and looping operation performed in Hong Kong, a legitimate and long-established business practice¹²⁴. Under previous US court decisions and Customs' rulings, Hong Kong traditionally had been the country of origin of these products¹²⁵. Because the smaller quota for sweaters under the US-China bilateral agreement than under the US-Hong Kong agreement, serious trade disruptions and disputes between parties concerned occurred¹²⁶.

Will a similar legal problem be raised between China and the Community? Would the competent authority take action if it deems it necessary to challenge the origin of the products concerned? If it does, what other legal problems may arise? The following discussions try to tackle some of these problems.

In the EEC textile trade, the rules governing the country-of-origin are unilaterally the rules in force in the Community¹²⁷, except in cases where international agreements have specific clauses on country-of-origin, which are very similar to the rules enforced in the Community¹²⁸. The Community generally takes the view that the products originate in the country where the last substantial transformation takes place¹²⁹. According to the current rules of origin in the Community, which were established in 1968, "a product in the production of which two or more countries were concerned shall be regarded as originating in the country in which the last substantial process or operation that is economically justified was performed, having been carried out in an undertaking equipped for the purpose, and resulting in the manufacture of a new product or representing an important stage of manufacture"¹³⁰.

In implementing Article 5 of Regulation No 802/68, the method of change of tariff heading has been adopted. According to this standard, the qualification of product of origin is conferred, if the processing or working transformation implies that the final product falls under a different tariff heading of the Common Customs Tariff than the raw material. This strict criterion of change of tariff heading is adjusted by an A- and a B-list. The A-list requires compliance with additional conditions for some products before they are conferred with origin, even if the processing or working operation has resulted in a change of tariff heading (negative list). For some products, the B-list provides the opportunity that processing or working operations can result in the obtaining of origin, even though

these operations do not lead to a change in tariff heading (positive list)¹³¹.

The case-law of the European Court of Justice has given some rulings on this issue, although the question is not entirely clear yet. It is clear, however, that the method of merely changing the tariff heading in determining the origin of goods was rejected by the Court in the Überseehandel case¹³². According to the Court, the tariff clarification of the Common Custom Tariff had been conceived to fulfil a special purpose and not in relation to the determination of the origin of goods. Whereas a more flexible application of the method of the changing of the tariff heading by way of adding A- and B-lists to it is, according to the Cousin decision, not in itself incompatible with Article 5 of Regulation No 802/68. By using this more precise method, the determination of origin of goods can be based on a real and objective distinction between raw material and the processed product within the meaning of the case-law of the Court¹³³. In the Yoshiola case also the Court held that a too restrictive interpretation by the Commission will not conform with the objective of Regulation No 802/68¹³⁴. However, in the Cousin's case, the Court recognised the power of the Commission to implement Article 5 of Regulation 208/68. According to this the Commission has a margin of discretion which allows it to define the abstract concepts of Article 5 with reference to a specific working or processing operation. The Court respected this margin of discretion and examined whether or not the Commission had exceeded the limits of its competence¹³⁵. One of these limits is the principle of equality and the prohibition on the

abuse of power. Regulation No 749/78 was declared invalid, not because of its rigourness itself, but because of the fact that the Commission could not provide an explanation for treating operations carried out on yarn more restrictively than the same operations carried out on cloth and fabrics¹³⁶. The Court might seem prepared to accept a restrictive implementation by the Commission to a certain extent provided that the principle of equality inter alia is complied with¹³⁷.

As far as textiles operations and working processing between China and Hong Kong is concerned, it is very unlikely that the Commission will deem China to be the country of origin of these sweaters (mentioned above). First, because looping operations undertaken in Hong Kong add more value to the final product, and require more skill, technology, time and complexity of operation; secondly, they also result in a greater physical change to the subject merchandise than knitting operations performed in China. Looping operations transform knit-to-sharp panels into sweaters that have a name, character, and use that is different from those of the panels, not only the changing of tariff heading¹³⁸. Thirdly, the practice of subcontracting panel knitting operations to Chinese factories originated because panel knitting is lower-skilled, low-paid work, the joint productive technique of knitting panel takes advantage of the comparative advantage of each: lower cost factories in China and skilled workers in Hong Kong. It is economically justifiable¹³⁸ and is not intended to circumvent the provision applicable in the Community¹⁴⁰. Other similar operations and working processing should

also be justifiable under the Community rules of origin. However, if the Commission does want to exercise its power by establishing rather severe requirements with regard to the conferring of origin, like the US government does, it must provide an objective justification to meet the general criteria of Article 5 of the Regulation No 802/68 and by the principle of equality, as established criteria by the Cousin case.

Outward Processing Clause

The new form of textile exchanges is also established in the form of outward processing trade¹⁴¹. Outward processing is the procedure by which raw materials or semi-manufactured products are exported to have certain stages of production taking place outside the Community¹⁴². It can then be re-imported into the Community without being charged on the quantitative limits concerned. The quantitative objectives as regards outward processing operations are agreed between the Community and China on 6 categories in Annex VII of Regulation No 2072/84. This sort of industrial co-operation gives the Chinese producer a new channel to expand in the Community market, although the quantities agreed upon are still very small¹⁴³. The Community, at the same time, can benefit from lower labour costs, and easily control transactions of this kind through its outward processing traffic regime.

Price Clause

The price clause which was concluded in the 1979 textile agreement has been dropped from the 1984 Supplementary Protocol. This clause provided a solid basis for the Community to take necessary measures to alleviate the impact of low-priced textiles from China, and thus enable the Community to restrain from using other commercial measures such as anti-dumping action. The deletion of the price clause may give Chinese exporters opportunities to sell their goods more easily in the Community Market, as they now can price their products lower than their Community counterparts.

To deal with the low-priced textile products from China, the US government has taken commercial measures, both anti-dumping proceedings and countervailing duty¹⁴⁴, whereas in the Community, none of these measures have been taken against textiles from China, although both measures are available to the Community. However, imports of Chinese textiles into the Community are more tightly controlled than into the United States.

D. Prospects and Conclusion for EEC-China Textiles Trade

Textiles represent one-quarter of China's exports to the EEC¹⁴⁵. Any change in the textile trade system will significantly change China's ability to export to the Community, and will thus affect EEC-China trade relations. The following legal issues concerning the

EEC-China textile trade system may directly relate to the prospects of the EEC-China textile trade.

The first issue concerns whether international textile trade should be continuously regulated separately from the GATT rules. A thorough discussion of this issue requires a full research and may develop into a separate Phd thesis. But as it shall greatly affect the EEC-China textile trade in future, a brief mention may be necessary.

The economic irrationality of the MFA is obvious and is well recognised¹⁴⁶. However, an immediate revocation of the MFA system may not be possible and be good neither for developing textiles exporting countries, nor for developed textile importing countries¹⁴⁷. But a gradual phase out is necessary to terminate the temporary MFA regime and is also possible¹⁴⁸. The return of textile trade to the GATT rules should be carefully arranged through multi-negotiations.

The second issue concerns the position of China vis-a-vis the EEC under the MFA regime. It is the question of whether China shall be treated as a "dominant supplier" in the Community Market. The Community has already made three suppliers be so treated (South Korea, Hong Kong and Macao). The Community has successfully cut back their quotas during the MFA III. In the current bilateral agreements with these three, the Community offers the lowest flexibility and the toughest rules against them. If China is classified as a dominant supplier, the legal mechanisms governing bilateral trade in textiles

between China and the EEC and quotas for individual products could be substantially different.

When China joined the MFA in 1984, other members noticed the increasing importance of China in the textile trade and some wanted China to be treated as a dominant supplier¹⁴⁹. At that time China was not ready to accept the allegation that it was a major textile trading country, neither could it agree that it was among the rank of the world leading suppliers¹⁵⁰. However, countries such as the United States reiterated that they would certainly accord China treatment which was equivalent and equitable to that accorded other similarly positioned textile trading nations¹⁵¹. In practice, China negotiated an agreement with the United States at a growth rate of 3.5 per cent., a rate much higher than the "big three" dominant suppliers (South Korea, Taiwan, and Hong Kong) had in the United States, which only got 0.5-2 per cent. growth rate at the same time¹⁵².

The situation now is somewhat different from then. Over the last ten years (1978-1987), China has had an extraordinary surge in textile trade. Between 1981 and 1985, for example, China had nearly 20 per cent. annual growth in its clothing exports to the developed countries¹⁵³. In 1986, its exports of textile products reached US\$ 6.5 billion¹⁵⁴, and US\$ 9.1 billion in 1987¹⁵⁵. By the end of 1987, China had become the biggest supplier in the world in terms of volumes, and one of the top suppliers in terms of values. A country with such a trade position is bound to be treated as a major textile trading country, and therefore with great possibility of being treated

as a dominant supplier and subject to more restrictive trade terms as other dominant suppliers are facing.

Notwithstanding the possibility of being classified as a dominant supplier, China may still gain a relatively high growth rate, because of the bargaining power in the bilateral negotiations. This was confirmed by the negotiation of China-USA textile agreement under the MFA IV. China was the USA top supplier of 1987, ahead of competitors from Hong Kong, Taiwan and South Korea. However, the textile agreement concluded at the end of 1987 allowed China an increase of 3 per cent. annually, which is still higher than the annual growth rate of Taiwan, Hong Kong and South Korea¹⁵⁶.

China's expansion of textile exports to the Community was not as dramatic as it was in the United States market. Nevertheless, over the ten years (from 1978 to 1987), the amount of exports to the Community increased 5 times in terms of the tonage, and 9 times in terms of the value¹⁵⁷. It is a very convincing argument that China is well qualified as a "dominant supplier" in the EEC market, as China has been represented about 6 per cent. of total extra EEC textile imports¹⁵⁸. The point is, even so, it may still be difficult for the Community to reduce the import growth rate from China as low as the Korean's, simply because now textiles are the principal Chinese export to the Community, and China runs a large amount of trade deficits generally vis-a-vis the Community. Further restriction on China's textiles export to the Community will inevitably push China into more deficits in bilateral trade, and thus restrict China from buying more

from the Community. It is safe to conclude, therefore, that a modest and steady growth of textiles from China can still be exported, despite a reported bleak outlook on textiles in the Community¹⁵⁹.

On the other hand, as far as China is concerned, as one of the world's top textile suppliers, China should not put emphasis on increasing the quantity which is becoming more tangent and limited, but should concentrate on enhancing the quality of the products and increasing the value of the products¹⁶⁰.

The third issue concerns whether the quota should be maintained at a national level. China was concerned by the Community's "burden sharing" system, ie, the quotas are not only imposed at the Community level, but also broken into a national level. When the imports concerned exceed the "share" in a particular region (or regions), such region (or regions) may reject importation of the product in question¹⁶¹. Furthermore, if a Member State feels that its market has been "disturbed", it can then introduce safeguard measures at national level in conjunction with the Commission¹⁶². In the textile agreement negotiations, China wanted to revoke the "burden sharing" system (or national quota system), or, if not possible, to increase quotas in some more marketable Member States¹⁶³. The Community rejected China's requirement during the negotiations¹⁶⁴. But this issue now will increasingly concern Chinese textile exporters as well as other EC textile trading partners as the date of the single market approaches.

It is understandable that textile manufacturers in the Community are concerned about the possible removal of the national barrier¹⁶⁵. One may foresee that it will bring difficulties for some Member States industries if national controls are removed and if national safeguard measures are abandoned, because this will allow third country exporters to the Community more flexibility in the use of their quotas; consequently it will increase their competitiveness, and possible market concentration and more market shares generally. The EC textile producers therefore want the national safeguard measures to remain, or alternatively, a reduction in the overall quotas allowed to third country exporter, as a compensation for the single market¹⁶⁶.

Clearly, safeguard measures between the Member States is contrary to the idea of the single market, a true single market would eliminate such measures. The quotas, if they still exist, ought to be at the Community level, once the single market becomes reality and no "burden sharing" system shall continue to exist. The safeguard measures, if any, should also be maintained at the Community level.

Footnotes (Chapter VIII)

- (1) B.L. Das, the GATT Multi-Fibre Arrangement. JWTL (1983) p95.
- (2) Ibid.
- (3) People's Daily (Overseas Edition), 4th July, 1987.
- (4) ZHANG Zhi-ya, the Government Report to the National People's Congress on 25th March, 1987, People's Daily, 13th April, 1987. According to Mr. Zhang, then Chinese Premier, the total GNP in 1986 was RMB¥ 1,877.4 billion, among which, the value of output of agricultures and industries was RMB¥ 1,510.4 billion.
- (5) Supra 3.
- (6) Ibid.
- (7) People's Daily, 18th May, 1988 and 4th February, 1989 respectively.
- (8) Ed Jenkins, H.R. 1562, 99th Congress 1st Session 131 Cong. Rec. S3079 (Daily ed. March 19, 1985). Also see Law and Policy in International Business Vol. 19 No 1 (1987). P210
- (9) Interviews with officials of the Commission.
- (10) EEC-China 1979 textile agreement. OJ No L389/3, 1986.
- (11) See discussion below.
- (12) OJ No L19/1, 26,1,1970.
- (13) OJ No L358/1, 31,12,1974.
- (14) OJ No L99/7, 21,4,1975.
- (15) Article 8, paragraph 2 of the Council Decision (75/210/EEC).
- (16) Harish Kapur, 1986, p59.
- (17) See Chapter II.
- (18) Supra 16.
- (19) "Europe Information", External Relation Series, No 44/81.
- (20) Supra 16.

- (21) See Annexe III, Agreement between the EEC and the PRC on trade in textile products. OJ No L389/30 31,12,1986. The products which subject to quantitative restrictions had been expanded to 37 categories during the period of implementation of the Agreement. Also see Sun Na-son, Legal Problems of Chinese textile exports, Studies on International Trade, March 1987. Beijing p44.
- (22) Kapur, p61.
- (23) Article 6 of the agreement. Detail discussion see below.
- (24) Annexe III.
- (25) Article 6 of the agreement.
- (26) MFA, ie The Arrangement Regarding International Trade in Textiles; The first MFA (MFA I) was found on 20th December, 1973 (GATT, BISD, 21st Supp. 1975 p3), came into force on 1st January, 1974, and expired on 31st December, 1977. The second MFA (MFA II) was concluded on 14th December, 1977 on the form of a Protocol and the original MFA text (ie MFA I) in operation from 1st January, 1978 to 31st December, 1981 (GATT, BISD, 28th Supp. 1977 p4). On 22nd December, 1981, a new Protocol was agreed upon, MFA I along with this Protocol was in operation from 1st January, 1982 to 31st July, 1986. On the final day of the MFA III, the MFA IV was concluded (ie, the current MFA) operating from 1st August, 1986 to 31st December, 1991. (OJ No L241/33 4,12,1986).
- (27) Supra 19. The EEC has proposed, and widely used the reasonable departures clause in MFA II to restrict imports of textile from developing countries.
- (28) Detail discussion see below.
- (29) China joined the MFA on 18th January, 1984 (Com. Tex/135) GATT, BISD 31st Supp. p296.
- (30) Economist June 27, 1987 p81.
- (31) Annexe I and IV of the agreement.
- (32) Article 2, paragraph 3.
- (33) Article 2, paragraph 4.
- (34) Article 3, paragraph 1.
- (35) Article 3, paragraph 2.
- (36) Preamble of the agreement.

- (37) Supra 21. The products subject to quantitative restrictions expanded from 23 to 37. The consultation arrangement see discussion below.
- (38) MFA III, Supra 26.
- (39) Kapur pp59 and 61.
- (40) Ibid.
- (41) MFA I, Supra 26.
- (42) The 1979 NOMEXE Code of the Community divided the textile products into 7 different groups according to their sensitivities, 8 products in Group I were classified as most sensitive. The Nomexe Code has subsequently re-classified in 1984 and 1988 respectively. See Annexe I, II and III to the agreement.
- (43) 0.5%, see Annexe III.
- (44) Ibid.
- (45) Supra 26.
- (46) Article 5 of the agreement.
- (47) Ibid.
- (48) Ibid.
- (49) Ibid.
- (50) Ibid and also see Supra 26 The MFA I.
- (51) Ibid.
- (52) Ibid.
- (53) Article 11, Common rules for imports of textile products originating in third countries, OJ No L374/106 31,12,1982.
- (54) Article 6 of the agreement.
- (55) Supra 37.
- (56) The share of burden as following:

1,1,1981 - 31,12,1986:

Germany	28.5%	Denmark	3%
Benelux	10.5%	Ireland	1%
France	18.5%	UK	23.5%
Italy	15%	Greece	2%

See: Article 11, paragraph 3 of the Council Regulation 3589/82, OJ No L374, 31,12,1982; and

1,1,1987 - 31,12,1991:

Germany	25.5	Ireland	0.8%
Benelux	9.5%	UK	21%
France	16.5%	Greece	1.5%
Italy	13.5%	Spain	7.5%
Denmark	2.7%	Portugal	1.5%

See: Council Regulation OJ L387, 31,12,1982. Article 11, paragraph 3.

- (57) Ibid.
- (58) Ibid.
- (59) Singal Act. OJ No L169, 29,6,1987.
- (60) New agreement concluded between the EEC and China on 13th December, 1988. The national quota or "share of burden" system is confirmed in the agreement. Financial Times 13th December, 1988, and DTI Press notice 28/943, 30th December, 1988. OJ L380 31.12.88.
- (61) Article 7 of the agreement.
- (62) EC textiles with other socialist countries.
- (63) Article 6, paragraphs 2 and 3.
- (64) See discussions in Chapter VII.
- (65) Ibid.
- (66) Article 10 of Protocol of Extension the Arrangement regarding International Trade in Textiles. GATT, BISD, 28th Supp. p6.
- (67) R.J.P.M. Van Patel, The Conduct of the EEC's textile trade policy and the application of Article 115 EEC, in Volker ed. Protectionism and the European Community 1983, p103.
- (68) Article 8, paragraph 1.
- (69) Supra 67.
- (70) Protocol A, Sections I and II.
- (71) Article 11 of the agreement.
- (72) Maurio Samuelson, Textile Industry alarmed over China trade deal prospects. Financial Times 7th February, 1979.

- (73) Article 11 of the agreement.
- (74) Ibid.
- (75) Financial Times, 7th May, 1988, People's Daily, 28th June, 1988, and Market, 24th August, 1988.
- (76) Article 12.
- (77) Ibid.
- (78) Ibid.
- (79) Ibid.
- (80) Article 13, paragraph 3.
- (81) See discussion in Chapter III.
- (82) Article 16, paragraph 1.
- (83) Ibid, paragraph 2.
- (84) Ibid.
- (85) Article 7 of agreement.
- (86) Article 6 of agreement.
- (87) Ibid.
- (88) Ibid.
- (89) Article 13 of agreement.
- (90) See discussion in "d" above.
- (91) Interviews with EC Commission officials. Also see P. De Smed, 3 China Law Reporter (1986) p180. The textiles products here are the MFA products only.
- (92) Ibid.
- (93) Ibid.
- (94) Ibid.
- (95) The Economist, 17th December, 1983 p68.
- (96) Ibid.
- (97) P. De Smed, Supra 91.
- (98) Supra 95.

- (99) GATT, BISD 31st Supp. p293.
- (100) P. De Smed, Supra 91.
- (101) OJ No L198/1, 27,7,1984.
- (102) Europe Information, External Relations: The EC and The PRC.
79/85 p7, and OJ No L309/1 31st December, 1986.
- (103) MFA III, Supra 26.
- (104) Ibid.
- (105) Ibid.
- (106) Ibid.
- (107) See discussions in "e" above.
- (108) Article 1, paragraph 4 of the Supplementary Protocol, OJ No
L389/3, 31st December, 1986.
- (109) Ibid.
- (110) Ibid.
- (111) Ibid.
- (112) Ibid.
- (113) Ibid.
- (114) Ibid.
- (115) Ibid.
- (116) Ibid.
- (117) Ibid.
- (118) Ibid.
- (119) Article 6, paragraph 10 of the 1979 textile agreement and
Article 1 paragraph 4 of 1984 Supplementary Protocol.
- (120) 49, Fed. Reg. 31,248 (August 3, 1984).
- (121) Ibid, article 32, 252.
- (122) Craig R. Giesse and Martin J. Lewin, the Multifiber Arrangement:
Temporary Protection Run Amuck, 19 Law and Policy in
International Business (1987) pp134-137, and note 490.
- (123) Ibid.

- (124) Ibid, and note 493.
- (125) Ibid, and note 494.
- (126) Ibid.
- (127) For example, Article 8, paragraph 2 of 1979 EEC-China textile agreement, and Article 3 paragraph 2 of the 1984 Protocol.
- (128) For example, Association Agreements between the EC and a number of countries, and also the third Lomé Convention.
- (129) Teenstra Jaap, Rules of origin on textile products: recent case-law of the Court of Justice, 22 CML Rev. p533.
- (130) Article 5 of the Council Regulation (EEC) No 802/68. OJ No L148/3, 28,6,1968. Spe. EC. 1968 III p165.
- (131) Commission Regulation (EEC) No 749/78. OJ No L101/7 14,4,1978.
- (132) Case 49/76 (1977) ECR 41.
- (133) Case 162/82 (1983) ECR 1101.
- (134) Case 24/78 (1979 ECR 115 and 151).
- (135) Supra 133.
- (136) Ibid.
- (137) Supra 129, p543.
- (138) Supra 122.
- (139) Ibid Note 493.
- (140) Supra 130. Article 6 of Council Regulation No 802/68.
- (141) Article 7, paragraph 1 of Supplementary Protocol.
- (142) E.E.M. Volker and J. Steenberger, Leading Cases and Materials on the External Relations Law of the EEC, 1986 p595.
- (143) Supra 108 p84.
- (144) In 1984, the Reagnien administration announced that no countervailing duty petitions against non-market economy countries would be accepted because such subsidies were difficult to determine. See supra 122, p144.
- (145) Financial Times, 13th December, 1988.

- (146) Martin Wolf, *Managed Trade in Practice: Implication of the Textile Agreements in Trade Policy in the 1980s*, ed. by William R. Cline (Institute of International Economics, Washington DC) 1983, p455.
- (147) John Greenwold and Scott Hoing, *the United States and the MFAN: Opportunities Lost*, 19 *Law and Policy in International Business* (1979) p171.
- (148) *Supra* 122, p51.
- (149) GATT, BISD, 31st Supp. pp294-297.
- (150) *Ibid*.
- (151) *Ibid*.
- (152) For example, United States-Hong Kong TIAS. No 10,420, see also Wolf at 480.
- (153) *The Economist*, 27th June, 1987, p81.
- (154) *People's Daily*, 4th July, 1987.
- (155) *Dai Gon Po*, 4th August, 1988.
- (156) *Ibid*, 9th September, 1987, and *People's Daily*, 21st December, 1987.
- (157) *Supra* 9.
- (158) *Ibid*.
- (159) *Financial Times*, 9th January, 1989. The new textile agreement between the Community and China was conducted on 13th December, 1988 to cover years from 1989 to 1992. It is a highly restrictive agreement, many new products are now subject to quotas according to it. However, China got a substantial increase in the export quotas for individual products. See *Financial Times*, 13th December, 1988 and DTI press notice 88/943, 30th December, 1988.
- (160) The quotas imposed on textiles are either in tonnage or in items, but not in value.
- (161) *Supra* 56, 59 and 60.
- (162) For example, The European Commission has authorised Britain to impose quota on cotton knickers and underpants from China into the UK market. *Financial Times*, 6th January, 1988.
- (163) Kapur, p60.
- (164) *Ibid*.

(165) Financial Times, 4th October, 1988.

(166) Ibid.

CHAPTER IX

CONCLUSION

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I EEC-CHINA ECONOMIC RELATIONS: DEVELOPMENT AND PROBLEMS

Relations between the European Community and the People's Republic of China have blossomed since the establishment of official relations in 1975. Politically, the two parties hold regular high level meetings and consultations, which stimulates the development of bilateral relations. Economically, bilateral trade reached US\$12.87 billion in 1988. The European Community is not only one of China's leading trade partners and investors, but also a principal supplier of relatively high technology and equipment to China.

It has been suggested that China's interests in the European Community have been primarily political, whereas the Community's interests in China are basically economic. Such a proposition is groundless. The rapid development of bilateral relations is motivated both by political and economic factors as far as both parties are concerned. Moreover, there is no clear-cut distinction between political and economic interests in the reality of the contemporary international community. Economic interests themselves are often

political, and this is particularly true in the case of trade and economic relations between China and the EEC.

The trade and economic relations, however, are admittedly far below the true potential. Trade with China only accounts for just over one percent of total EEC external trade. The trade volumes between them are far behind trade volumes between China and Japan. The EC investments in China are far behind those of the USA and Japan.

Various reasons may explain the EEC's relatively weak position in China; they include historical, cultural and geographical factors. But from the legal point of view, the following factors, may have hindered the further development of trade and economic relations between China and the EC:

- (a) the growing protectionist tendency in the European Community has largely to be blamed in impeding the development of the EEC-China trade and economic relations. Despite the formal commitment to free trade, there is an increasing tendency on the part of the Community to turn to more rigid protectionism. The evidence can be found in the EC's increasing restrictive trade policies in trade in textiles vis-à-vis China. The frequent application of the anti-dumping rules over the last ten years also pointed to the same direction;
- (b) the organisational framework of the European Community itself, as it is presently constituted, has also created problems and

obstacles regarding the development of trade and economic relations with China. The Community decision-making process on economic issues gets bogged down, because the wishes of the twelve highly individualistic Member States have to be taken into account and incorporated into the final decision before any steps can be taken. On a number of occasions, the Community could not reach the necessary unanimity in the decision process which would otherwise help to increase bilateral trade. In the GSP schemes, for example, the Commission has recommended repeatedly to extend the products in the agriculture sector under the GSP scheme, and to increase the GSP quantities for Chinese industrial products. This recommendation was from time to time scaled down by the Council;

- (c) the EEC-China trade and economic relations are also restricted by the embargo of the Co-ordinating Committee for Multilateral Export Control (COCOM), a Western watchdog body that supervises strategic sales to Communist countries and a product of the Cold War. Although the restrictions are generally less tight on China than on the USSR and East European countries, there are nevertheless numerous items that cannot be sold to China, or for which special permission is required. Some items may be generally accepted as having strategic importance, but most of the items are under embargo only for economic reasons. The fears of ruthless competition among European and American multinationals or the fear that the Chinese producers may eventually become competitors in the field carry main weight. It was not

surprising, therefore, when the Belgian Bell concluded an agreement for the sale of a 100,000 digital telephone line to China, and a \$250 million joint venture factory in China, that the French came to compete, and the Americans wanted to curb at least part of the deal.

Above mentioned problems can and will be overcome, particularly in line with the 1992 single European market programme. For example, to overcome the organisational problem, the Commission will have more autonomy in external trade policy-making. And the Community will technically use more majority votes instead of unanimous votes in policy formulation.

It should be added that because of the difficulty to assess the full impact of the "Beijing Events" of June 4th, 1989 on China's direction and development in general, and its relations with the EC in particular, I have not included an assessment of impact on EEC-China trade and economic relations in my concluding analyses. It is clear, however, that because of the "Beijing Event", from the economic point of view, if China still reforms its economy towards a more market oriented direction, as it did over the last ten years, the Community should continue to liberalise the restrictions on imports from China. But, if the reform stops or even reverses, the Community may treat China as an NME and impose more restrictions. From the political point of view, on the other hand, it is predictable that the Community is less willing to treat China more liberally after the Event. In

this respect, the bilateral trade and economic relations would be affected.

II NME THEORY AND TRANSITIONAL CHINESE ECONOMY

There is always a fundamental contradiction in the EEC's attitude towards China in trade and economic relations, that is whether China should be treated as a non-market economy (or State-trading) country, or as a developing economy country. It is recognised sometimes by the Community that China is a developing country with an economy at a different development level from that of the European Community. The Community, based on such an acknowledgement, has granted development aid to China from its non-associated country fund. Nevertheless, as a principle, the Community treats China as a non-market economy regardless of the fact that China is a developing country. In fact, by way of placing China into the category of non-market economies, the Community deprived China of many rights which a developing country would have otherwise enjoyed.

The reason why the Community takes such an attitude is obvious. On the one hand, the Community fears that any easy market access by the Chinese products may distort the Community market, bearing in mind that China has enormous natural resources and massive cheap labour; on the other hand, the policy-makers in the Community institutions and the Member States believe that because China is a socialist country, the Government, by utilising the plan and other measures, can manoeuvre prices and other matters concerning business transactions,

which are supposed to be decided by the market forces in a normal market economy. Consequently, the low-priced Chinese products would disrupt the Community market. Moreover, because the Chinese government controls the foreign trade and the whole domestic economy, there is little chance for the Community industries to penetrate the Chinese market. The Community, therefore, should make appropriate steps to protect its own market. Yet, one would wonder whether the covert motivation of the European Community for taking a very restrictive attitude towards Chinese products (apart from political considerations, if any) is that the European Community cannot imagine the situation of facing another Japan in 30 or 50 years time. To prevent China from becoming an ultimate competitor, the best way is to cope with it at an early stage.

However, the conclusion that China is still a traditional non-market economy is no longer a correct reflection of the Chinese economic reality. The Chinese economic system after ten years of reform has been greatly changed towards a more mixed economy. The reform of the planning system has reduced the number of products subject to mandatory plan to just over 20; the reform of the price system has allowed most prices to be influenced or regulated by the market forces rather than decided by the State; the reform of the enterprise system of ownership and management has to some extent separated enterprises from the State so that they ultimately function independently; the reform of the foreign trade system has broken down the State monopoly in foreign trade.

It is submitted that, since World War II, international trade law has developed rules, no matter how weak, to regulate East-West trade, and a set of rules to govern trade relations between developed and developing countries. But thus far no specific rules have been developed to regulate trade with a developing socialist country like China. The problem was not apparent until China opened its door and started its economic reform ten years ago. As far as the European Community is concerned, how to treat China in bilateral trade relations always seems problematic. The Community fears low-priced products from China and China always fears that she is being unfairly treated. It is very true that ten years ago China was a typical State-trading country (or a non-market, centrally controlled economy). On the other hand, China is also a developing country (the largest developing country in fact). The Western trading partners, namely the United States and the European Community, treat China basically the same as they do the Soviet Union and Eastern European countries. It is understandable for the European Community, along with other Western countries, to treat China in this way. However, two important consequences have resulted:

- (i) As the largest developing country, China cannot enjoy the treatment granted to developing countries in international trade. Imports from China are subject to quantitative restrictions under the EEC trade regime, although MFN treatment has been granted.

- (ii) After ten years of reform the Chinese economy is now in a transitional stage. This stage is different from a traditional non-market economy. It is still going towards a more mixed economy. The market forces will play an increasingly important role in China. This fact is, however, little recognised by the Western trading partners. China is, and will still be, classified as a State-trading country in the foreseeable future.

China always claims that it has been unfairly treated under situation (i) above. In line with its reform progress, it will cry out even more strongly that it is being unfairly treated as a State-trading country. China has formally applied to resume its GATT membership as a developing country as opposed to a State-trading country. During the last ten years China's foreign trade has effectively increased from US\$20.64 billion in 1978 to over US\$100 billion in 1988. It is expected that China's international trade position should be stronger in the 1990s and in the next century. The problem of how to treat China will be more frequently encountered by the European Community, as well as by other developed countries.

There is no ready-made answer available to this question at present. However, it is submitted that a two stage approach could be adopted to tackle the problem:

- (i) At the present stage a compromise trade law system must be created. China should basically be treated as a developing

country, albeit with certain restrictions. The European Community should revoke most existing quantitative restrictions against imports from China. It should also revoke the restrictions imposed on China of full access to the EEC's GSP scheme. On the other hand, the safeguard clause should be precisely defined to deal with possible disturbance because of imports from China.

- (ii) When reform in China goes as far as to establish a system which is more compatible with GATT rules, China should be accordingly treated as a normal developing country. The quantitative restrictions established according to the judgement of China's economic system should then be completely abolished. Other restrictions should also be abolished.

III INCOMPATIBILITIES OF BILATERAL RELATIONS

There exist two general incompatibilities in EEC-China trade relations, which mark the EEC-China trade as a difficult regime to manage. The first incompatibility is at the theoretical level. As far as the EEC is concerned, it is committed to free trade at least in theory (never mind whatever it has done in reality). Whereas on the Chinese side, there is no commitment to free trade even in theory. Although the Chinese foreign trade system has been substantially decentralised, the government may still have great persuasive power and control over foreign trade in one way or another. It believes

that foreign trade should be controlled and regulated by the state to a certain degree. The second incompatibility is at the practical level. In practice, the European Community also exercises controls over external trade, with more visible measures, such as quantitative restrictions and antidumping proceedings. It also adopts a differential trade policy, giving different preferences to a number of countries ranging from the EFTA countries, to the 66 ACP developing countries and to the Mediterranean neighbouring countries. Whereas in China, apart from visible measures, the Government is more ready to use some invisible measures to control foreign trade, such as foreign exchange allocation, licensing, or administrative discretions.

The Trade Agreement concluded in 1978, and renewed and expanded in 1985, was based on the Community's proposal for a trade agreement with State-trading countries. The Agreement did not bridge these incompatibilities. On the contrary, it legalised the EC's discriminatory quantitative restrictions against imports from China, putting China in a most disadvantageous position in trading with the EC vis-a-vis other EC trading partners. It also allows China to adopt a restrictive trade policy towards the EEC. In the Agreement, both parties have made a commitment to facilitate the increase in bilateral trade. However, each party retains a considerable degree of discretion as how to do it. In practice, the negotiations in the annual joint committee meeting play a decisive role in managing and expanding bilateral trade.

Such an arrangement is far from satisfactory. First, this arrangement is very much one-sided. It is a product of dominance of the EC economic superpower. The Agreement does not grant any preferences to China, as it is a developing country, but imposes additional quantitative restrictions on China as it was also a State-trading country. Secondly, such an arrangement, both in respect of the restrictive MFN treatment and safeguard provisions, is inconsistent with the GATT principles. The promise from the Chinese side to give the EC favourable consideration, in particular, is directly against the GATT principles. It drew international trade back into bilateralism and barter. Thirdly, such an arrangement may easily serve the purpose of protecting the domestic market of both sides. While the EC may be able to use its economic strength to get more benefits from such trade regime, it is ultimately less beneficial for both parties because it slows down the development of trade and economic relations.

The issue is now becoming particularly relevant and important as, first, the single European market will be a reality after 1992, and, secondly, China is applying to resume its seat in the GATT.

Naturally, the trading partners of the EEC are concerned whether the EC will become a fortress Europe after 1992. Neither the single European Act nor the White paper have themselves made any change to the Community's commercial policy towards third countries in a more liberal or protective direction. But one difficulty has been and will continue to be the lack of agreement amongst Member states upon the

precise policies to be adopted. While the Treaty provides for the Community to maintain a common commercial policy thus giving the Commission an important role in its formulation, the Council, which represents the Member States, retains considerable powers. The lack of policy coupled with the often contradictory signals which have emanated from the Commission and the Member States undoubtedly contributed to a growing concern that the Community may increase protection through the use of 1992 to create a fortress Europe. This is heightened by increasing calls from European industry for protection during the early stages of the programme. In the field of anti-dumping, for example, the Community has revised Regulation, among others, establishing a new procedure to prevent circumvention of antidumping duties by means of the establishment of "screwdriver" assembly plants in the Community. The Community has also dramatically increased invocation of antidumping proceedings, recently to protect its industry.

These moves are regarded as indicatives that the Community external policy has yet to be determined. The Community has been criticised as "adopted discrimination as a norm, a guiding principles" for the past two decades. It is essential therefore that the Community should not only carry on the flag of free trade, but also be committed to free trade in practice. In addition to paying lip-service to free trade and a multilateral trading system, the EC should in practice be less restrictive, less bilateral and open up more.

As far as China's negotiations with the GATT are concerned, the outcome of the negotiations is closely related to the development of China's economic reform. After a few years of economic reform, the economic system and the foreign trade system in China has been drastically changed. However, the GATT signatories are concerned on the issues of the speed and effectiveness of the economic reform; Chinese pricing and costing methods, the lack of information for foreign traders and the availability of foreign exchange.

China expects to be accorded the preferential treatment allowed for developing countries in GATT. It also expects to resume its GATT membership through reducing its tariff barriers. This requires China to speed up, not slow down, its economic reform, and to further diminish visible and invisible restrictions on international trade.

The above two aspects (ie the single European market in 1992 and China's attempt to rejoin the GATT) are bound to reshape the future EEC-China trade and economic relations. Both the development of the EC policy regarding external trade and economic relations, and the outcome of the GATT membership negotiations will greatly affect any arrangement between China and the EEC. It may be difficult to predict the direction of the EC's external policy, and the result of GATT negotiations, but changes on EEC-China trade relations may be expected to follow. First, as trade relations after China rejoins the GATT will be governed by the multilateral rules (GATT rules) rather than bilateral agreement, the promise of special favourable treatment given by the Chinese side to the EEC industry provided in the 1978 and

1985 Agreement cannot and should not be valid, because it is against the principle of non-discrimination. Also, the Community's special commercial measure, which is designed to protect industry against non-GATT third countries, cannot be applied against China any more. The Community in this respect may want to consolidate the position through a revised and possible selective safeguard clause. Further, the settlement of disputes under the current agreement is through negotiation in the Joint Committee. In case the parties cannot reach mutual satisfactory agreement, either party can take unilateral action. Once China rejoins the GATT, the safeguard actions taken must be within the GATT rules, and either party may also refer the disputes regarding the safeguard action to the GATT. Last but not least, the Community may have to revoke the discriminatory quantitative restrictions against China depending on the outcome of the GATT-China negotiations. It is submitted that the EC should remove these quantitative restrictions upon the development that China will move to a more market-orientated economy and open up its own market to the EC. Before that the community may remove the QRs gradually in line with the steps of China's economic reform, at the same time, more safeguard actions may be invoked by the EEC side in order to prevent possible market disruptions.

IV POSSIBLE DIRECT EFFECT

The two Agreements concluded between China and the EEC in 1978 and 1985 respectively are important both politically and economically. From the legal point of view, however, these two Agreements are very

vaguely worded. It is submitted that it seems hardly possible to get a positive ruling from the European Court of Justice concerning the possibility of direct effect of these Agreements. According to the Court rulings, the nature of an agreement may not be the decisive factor in the consideration of direct effect but the specific purpose of a particular provision may be vitally important. It is beyond doubt that in order to be able to have a direct effect of a provision in front of the European Court, a clear, unconditional right must be created. The two Agreements, however, have failed to meet such a condition in this respect. The 1978 Trade Agreement provides a basic legal framework for bilateral trade and the 1985 Co-operation Agreement is extended to cover economic co-operation. The terms in the Agreements are flexible; each party can take unilateral action as a last resort; no unconditional rights or obligations have been created. Therefore, the European Court is unlikely to give these direct effect.

On the other hand, the Chinese courts have not yet developed rules governing the issue of direct effect of international agreements, although paradoxically, the application of an international treaty in China does not require a separate domestic regulation to adopt it. Because of the special legal and political system of China, the issue of direct effect of an international treaty in front of the Chinese court has not arisen. However, in line with the recent development of economic reforms and re-building the legal system, the individuals, including foreign investors in China, may raise this question in a Chinese court. The Chinese court therefore

will have to develop rules and criteria in this regard. In the only reported case involving the application of an international convention, a local Chinese court simply applied the international convention without giving any explanation of the condition or criterion for direct effect of an international treaty in the Chinese court. It seems that the Chinese court is adopting international practice in dealing with the issue of direct effect.

V RULES OF CO-OPERATION

The basic legal character of economic cooperation between two parties is that they have concluded a Cooperation Agreement in 1985 which only set out general legal framework for economic co-operation. The Agreement identifies the objectives of economic co-operation and lists the activities which the EC and China will try to promote to attain their objectives, but left it to the countries and industries concerned to decide on individual projects in co-operation. In addition, the Agreement also provides for development aid from the EC to continue its development activities in China.

EEC-China economic co-operation has developed steadily since the conclusion of 1985 Co-operation Agreement. The co-operation is conducted in a wide range of areas with various forms. Also, the Community's development activities are undertaken in the areas of agriculture, mining, environment and personnel training. The EEC-China economic relations have therefore reached an advanced level in comparison with trade relations.

However, the legal framework provided in the 1985 Co-operation Agreement lacks practical details, it also lacks any financial commitment by both sides to support the co-operation scheme. Consequently, the development of economic co-operation between China and the EEC is very much dependent upon the development of the political and economic relationship between China and individual Member States and the Community itself. In this respect, the legal framework provided in the 1985 Agreement is no more than an expression of political goodwill. It is submitted that the economic co-operation between two parties should be further promoted. The co-operation should be supported by more detailed legal framework and more commitment in a mutually desirable and beneficial way.

VI EC ANTI-DUMPING RULES RELATING TO CHINA

The Community's antidumping rules play an important role in its trading with China. Since 1979 exports from China have been subject to EC antidumping proceedings from time to time.

By way of enumerating a number of countries as non-market economies for the purpose of antidumping, the Community applies a separate rule against imports from the non-market economy countries. China is classified as one of these non-market economy countries. The concept of non-market economy is, however, no longer an accurate one in describing the Chinese economic system. After few years of economic reform, the State monopoly over foreign trade in China has been dismantled to a certain extent. The economy is regulated both by

the State plan and market forces, with a tendency for the latter to play an increasingly important role. The Community's approach saves the Commission from having to determine in each case whether it regards the country concerned to be an NME. However, such an approach gives no criteria as to why a country qualifies as an NME, and lacks a careful analysis of a particular economy. Further, the country in question does not even have a chance to contest this. Moreover, such an approach is less flexible and less adaptable in reflecting changes in the economic structure and economic system of the country concerned, it is therefore a disincentive to countries which have more market-oriented economies. It is submitted that the Community should discard the concept of NME in relation to applying antidumping rules against exports from China. As a first step, it can change its enumerative approach, and give objective criteria of NME status, and make it possible to apply market economy rules on a sectional or regional basis.

The Community's methods of selection of analogue countries has also proved to be problematic. The antidumping law itself gives hardly any guidance, but in practice the Commission usually regards two factors to be decisive in selecting the analogue country, ie the structure of the manufacturing process and the competitiveness of the market. The comparative levels of the economic development between the non-market economy and the selected analogue country have not been considered as a significant factor in the Commission's choice of an analogue country. In practice, the selected analogue countries have always been those having a much higher level of economic development

than that of China. As a result, a positive finding of dumping is more likely. An opinion given by an Advocate General of the Court, however, has given indication that the economic development level is one of the characteristics to be considered in determining the analogue country, on a par with the competitiveness of the market and the structure of the manufacturing process.

There are a number of difficult problems relating to the approach of using the price of an analogue country as the normal value of Chinese products. For example, the outcome of the process of selection of an analogue country is unpredictable. As a result, the Chinese exporters must know the prices or even the cost of production of a similar product in some unidentified third country. It is not commercially reasonable nor fair to the exporters. Also, the analogue producers by definition are the competitors in the market. The information supplied by them, therefore, may not be complete or even trustworthy. Moreover, the analogue country approach has totally rejected the possible comparative advantages China may have enjoyed. Comparative advantage is the essence of international trade. In the production of certain products, for instance, raw materials are only available in China, or the raw materials in China have a much higher quality. The EC rules failed to recognise any of such advantages.

If the Community is still using the NME concept in dealing with China in antidumping proceedings, then the totally unpredictable approach of analogue country should be replaced by a more predictable and less discriminatory approach. For example, the normal value can

be found in one of China's special economic zones, or can be constructed in accordance with the market price in these special economic zones, where the market forces play a dominant role. Before the Community eventually moves to change some of the provisions, the Commission (which has great administrative discretion in deciding the analogue country) should follow the opinion of the Advocate General in selecting the analogue country by giving consideration be given to the comparable level of economic development "as one of the essential characters", in order to reach a more equitable result.

VII EEC-CHINA TRADE IN TEXTILE

Textiles accounted for one-third of total exports from China into the EEC, making China the Community's second largest external supplier in terms of value in 1986. The trade in textiles between the two parties is governed by separate arrangements.

In 1979, the EC and China concluded a 5-year agreement on textiles. An Additional Protocol was concluded in 1984, when China adhered to the MFA. The 1979 textile agreement granted significantly increased access for textile products from China into the Community market. When this agreement expired in 1984, the exports of textiles from China reached over 3 times in terms of tonnages and over 5 times in terms of value compared with the year before the agreement (1978). However, the quotas arranged thereunder were considerably below what China asked for, and, more importantly, the terms concluded in the agreement was clearly well devised to protect the Community's

interests. This is evidenced by the provisions included in the agreement, for example the price clause, the basket extractor mechanism, the half-way antisurge clause, the guaranteed raw materials supply, and the imports into China formula and so on.

The increasing imports of cheap Chinese textiles into the EC caused increasing concern both to the European textiles industry and to the European authorities. The 1984 Additional Protocol, therefore, has become more restrictive. It expanded the numbers of textile products subject to quantitative restrictions. It also put more products under various restrictions. Since 1984, the growth rate for textile products into the Community has obviously slowed down.

The arrangements of textile trading between China and the EEC are legalised under the GATT MFA aegis. However, the EC was the driving force leading the industrialised countries to create the separate legal regime of trading in textiles. Trade in textiles between developing countries and the developed countries are under strict control. The bilateral and multilateral arrangements in textiles are far from comparable with EC's commitment to trade liberalism. This is another example of self-contradiction in the EC's philosophy and its practice in international trade. It is submitted that the international trade in textiles should return to the GATT rules as soon as possible. The EC can play a crucial role in this new transformation. The restrictions on trade in textiles between the EC and China should be gradually removed. On the other hand, the Chinese

exporters should focus on improving the quality of their products instead of increasing the quantity of the exports.